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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
Counsel of Record
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

QUESTION PRESENTED

Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. 253(a), provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The question presented is as follows:

Whether a state or local regulation that does not expressly prohibit the provision of telecommunications service is nevertheless preempted by 47 U.S.C. 253(a) if it substantially impedes an entity from providing service.

PARTIES TO THE PROCEEDING

Petitioner is Sprint Telephony PCS, L.P., a wholly owned subsidiary of Sprint Nextel Corporation. Respondents are the County of San Diego and Greg Cox, Dianne Jacob, Bill Horn, Ron Roberts, and Pam Slater-Price, Members of the Board of Supervisors of the County of San Diego.

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PETITION FOR A WRIT OF CERTIORARI

Sprint Telephony PCS, L.P., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-17a) is reported at 543 F.3d 571. The opinion of the court of appeals panel (App., *infra*, 18a-53a), as amended, is reported at 490 F.3d 700. The district court's order granting summary judgment to petitioner and denying summary judgment to respondents in relevant part (App., *infra*, 54a-89a) is reported at 377 F. Supp. 2d 886.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 253 of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. 253, and the San Diego County Ordinance Amending the Zoning Ordinance Relating to Wireless Telecommunications Facilities (Wireless Ordinance), Ord. No. 9549 (2003) (codified at Zoning Ord. §§ 6980-6991), are reproduced in the appendix to this petition (App., *infra*, 92a-115a).

STATEMENT

Petitioner brought suit against respondents in the United States District Court for the Southern District of California, claiming, *inter alia*, that the San Diego County Wireless Ordinance was preempted by Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996). The district court granted summary judgment to petitioner and denied summary judgment to respondents on that claim. App., *infra*, 54a-89a. A panel of the court of appeals affirmed. *Id.* at 18a-53a. After granting rehearing en banc, however, the court of appeals reversed, holding that the Wireless Ordinance was not preempted. *Id.* at 1a-17a. In doing so, the court of appeals expressly recognized that its interpretation of Section 253(a) conflicted with those of several other circuits. See *id.* at 9a-10a.

1. a. Congress enacted the Telecommunications Act of 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and en-

courage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56. The Telecommunications Act was intended to "end[] the long-standing regime of state-sanctioned monopolies" in the provision of telephone service, *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999), and to "accelerate rapidly private sector deployment of advanced telecommunications [services] to all Americans by opening all telecommunications markets to competition," H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Although the wireless communications industry was still in its relative infancy, Congress expressed particular concern about the need to remove barriers to competition in that industry. Specifically, the House Commerce Committee found that state and local zoning decisions concerning the placement of wireless facilities were "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements" that was threatening to "inhibit the deployment" of wireless services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995).

In significant respects, the Telecommunications Act shifted the locus of regulatory authority over the telecommunications industry from the state and local level to the federal level. One of the Telecommunication Act's "central" provisions in this regard was its preemption provision, new Section 253 of the Communications Act of 1934, 47 U.S.C. 253. See *Cablevision of Boston, Inc.* v. *Public Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); see also *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,440 (¶ 102) (1997) (noting that Section 253 was a "critical component of Congress' pro-competitive deregulatory national policy framework"). The subsection of that provision at issue here, Section 253(a), provides that "[n]o State or local

statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). Section 253(a) was intended to "preempt[] almost all State and local barriers to competing with the telephone companies," S. Rep. No. 23, 104th Cong., 1st Sess. 5 (1995), and to ensure that federal telecommunications policy "would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states," *In re Public Utility Comm'n*, 13 F.C.C.R. 3460, 3463 (¶ 4) (1997), petition for review denied, 164 F.3d 49 (D.C. Cir. 1999).

b. San Diego County, California, is the sixth largest county in the United States, with a population of nearly 3 million. See U.S. Census Bureau, 100 Largest U.S. Counties (July 1, 2007) <http://www.census.gov/popest/counties/CO-EST2007-07.html>. On April 30, 2003, the County's Board of Supervisors adopted the Wireless Ordinance. The stated purpose of that ordinance was to "provide a uniform and comprehensive set of standards for the development, siting and installation of wireless telecommunications facilities" in San Diego County. Zoning Ord. § 6982.

The Wireless Ordinance establishes a host of substantive and procedural requirements for the placement and design of wireless facilities, above and beyond the generally applicable requirements contained in preexisting provisions of the county's zoning ordinance. As a substantive matter, the Wireless Ordinance requires a provider to show that a proposed wireless facility is "necessary" to close a "gap" in the provider's service network. Zoning Ord. § 6984(a). The proposed facility, moreover, must be located in a "preferred zone" (*e.g.*, in certain listed areas) and at a "preferred location" within

that zone (*e.g.*, on an existing structure or a commercial or industrial building), unless the provider can show that such a location would not be "technologically or legally feasible." *Id.* § 6986(a)-(b). In addition, a proposed wireless facility must "be designed to minimize the visual impact to the greatest extent feasible * * * and to be compatible with existing architectural elements * * * and other site characteristics," *id.* § 6987(f); the facility must be "the minimum height required from a technological standpoint for the proposed site," *id.* § 6984(c)(1); and the facility must meet a number of other highly detailed design requirements (right down to the use of "non-reflective" colors and "graffiti-resistant coating[s]"), *id.* § 6986(a)-(e), (g)-(r).

Where the proposed facility will be located in a residential area, any tower in the facility must be set back from the nearest lot by a distance of at least 50 feet, Zoning Ord. § 6985(c)(4), and certain types of towers may not be used, *id.* § 6985(c)(1). No matter where the facility is located, moreover, the provider must agree to share the facility with other providers, as long as it would be feasible and "aesthetically desirable" to do so. *Id.* § 6984(c)(9). And even if the proposed facility is in compliance with applicable requirements established by the Federal Communications Commission (FCC), the County may deny permission if the facility would interfere with its regional communications system. *Id.* § 6984(c)(11).

As a procedural matter, the Wireless Ordinance establishes four tiers of review for applications for wireless facilities, depending on the type of the facility and its location. Zoning Ord. § 6985(a). Lower-tier applications are subject to review by the Director of the Planning and Land Use Department (with or without community input); higher-tier applications require use permits and

may be reviewed directly by the Planning Commission. *Id.* § 6985(a)-(b). Regardless of the tier to which an application is assigned, however, a provider must comply with detailed application requirements. For example, the provider must submit a map showing "the gap [that] the facility is meant to close"; a "visual impact analysis," including photo simulations, the proposed color scheme, and a site map; and a detailed narrative with information about, *inter alia*, the facility's height, landscaping, maintenance, and noise levels. *Id.* § 6984(a)-(c). And the Director of the Planning and Land Use Department retains the discretion, "based upon specific project factors," to require the provider to submit additional information. *Id.* § 6984.

A provider seeking to build a wireless facility in San Diego County must also satisfy the generally applicable requirements contained in preexisting provisions of the county's zoning ordinance. Where a use permit is required—*i.e.*, for most "high-visibility" facilities or facilities located in residential or rural areas—the provider must submit still more information (such as an assessment of the environmental impact of the facility), Zoning Ord. § 7354(b), and the application must be considered at a public hearing, *id.* § 7356. Critically, the County retains the unfettered discretion to grant or deny the application based on "[a]ny * * * relevant impact of the proposed use." *Id.* § 7358(a)(6). If it grants the application, the County may impose any conditions on the use that are "reasonable and necessary or advisable under the circumstances," *id.* § 7362, and may revoke or modify the permit at any time, *id.* § 7382. A provider that fails to comply with any provision of the zoning ordinance is subject to criminal and civil penalties. *Id.* § 7703.

2. Petitioner is one of the Nation's largest providers of wireless telecommunications services (including mo-

bile telephone service). On July 15, 2003, petitioner, filed suit against respondents, the County of San Diego and the members of its Board of Supervisors, in the United States District Court for the Southern District of California.[1] Petitioner claimed, *inter alia*, that the San Diego County Wireless Ordinance was preempted by 47 U.S.C. 253(a).[2]

After the parties cross-moved for summary judgment on petitioner's Section 253(a) claim, the district court granted summary judgment to petitioner (and denied summary judgment to respondents) on that claim. App., *infra*, 54a-89a. As is relevant here, the district court held that the Wireless Ordinance was preempted by Section 253(a). *Id.* at 65a-74a.

The district court reasoned that the relevant inquiry under Section 253(a) was "whether the regulatory scheme established by the [Wireless Ordinance] prohibits or has the effect of prohibiting [petitioner] from providing wireless telecommunications service." App., *infra*, 65a. The district court noted that "[c]ourts applying

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[1] Another wireless provider, Pacific Bell Wireless (now a subsidiary of AT&T), joined in the complaint and subsequently settled.

[2] Petitioner also claimed that the Wireless Ordinance discriminated against some providers using public rights-of-way, in violation of 47 U.S.C. 253(c), and that plaintiffs were entitled to damages for the alleged violations of Section 253 pursuant to 42 U.S.C. 1983. See C.A. E.R. 11-12. The district court dismissed the Section 253(c) claim on the ground that Section 253(c) "does not provide an independent cause of action." *Id.* at 23. Petitioner abandoned that claim on appeal. As for the Section 1983 claim, the district court granted summary judgment to respondents on that claim on the ground that "section 253(a) does not give rise to a private right enforceable through [Section] 1983," App., *infra*, 81a, and the en banc court of appeals agreed that "[Section] 1983 claims cannot be brought for violations of [Section] 253," *id.* at 16a. Petitioner does not challenge that holding of the court of appeals in this petition.

section 253(a) have found that certain features of regulations, in combination, have the effect of prohibiting the provision of telecommunications services." *Id.* at 65a-66a. Those features, the court continued, "include * * * numerous submission or disclosure requirements, retention of discretion by the city to require further disclosures, public hearing requirements, unlimited discretion of the city to grant or deny permits, and civil and/or criminal penalties." *Id.* at 66a (citing cases). The court then determined that, "[l]ike the ordinances and regulations in the cases [cited], the [Wireless Ordinance] includes a number of features that have the collective effect of prohibiting the provision of telecommunications service." *Id.* at 70a. The court explained that the Wireless Ordinance "impose[s] burdensome submission requirements"; "unreasonabl[y]" requires providers to be willing to share their facilities, regardless of the terms; and "allow[s] for the exercise of unfettered discretion at every level of the application process." *Id.* at 70a-71a.[3]

3. A panel of the court of appeals affirmed. App., *infra*, 18a-52a. With regard to whether the Wireless Ordinance was preempted by Section 253(a), the panel stated that this case raised "almost identical" concerns to those

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[3] The district court also held that the Wireless Ordinance was not saved by 47 U.S.C. 253(c), which preserves the authority of a state or local government "to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers * * * for use of public rights-of-way on a non-discriminatory basis." App., *infra*, 74a-78a. The court reasoned that "Section 253(c) clearly does not apply to the extent that the [Wireless Ordinance] goes beyond regulating the public rights-of-way," *id.* at 75a, and that, even if the Wireless Ordinance could be interpreted to apply only to public rights-of-way, "many of its requirements would not qualify as management of the public rights-of-way," *id.* at 76a (internal quotation marks omitted). Respondents did not contend on appeal that the Wireless Ordinance was saved by Section 253(c).

raised in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), in which the court had held that similar ordinances were preempted. App., *infra*, 48a. The panel explained that "[t]he [Wireless Ordinance], on its face, supplements the Zoning Ordinance by adding submission requirements to an already voluminous list." *Ibid.* "Those requirements," the panel continued, "are in addition to the open-ended discretion and threat of criminal penalties contained in the Zoning Ordinance." *Ibid.* The panel added that "[t]he [Wireless Ordinance] itself explicitly allows the decision maker to determine whether a facility is appropriately 'camouflaged,' 'consistent with community character,' and designed to have minimum 'visual impact.'" *Ibid.* (citations omitted). The panel therefore concluded that "the [Wireless Ordinance] imposes a permitting structure and design requirements that present[] barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a)." *Ibid.*

4. After granting rehearing en banc, the court of appeals reversed, holding that the Wireless Ordinance was not preempted. App., *infra*, 1a-17a.

As is relevant here, the en banc court of appeals first noted that the panel in *City of Auburn* had "adopted [a] broad interpretation of [the] preemptive effect" of Section 253(a). App., *infra*, 8a. The court reasoned that, by erroneously relying on the use of the word "may" in that provision, the *City of Auburn* court had held that, "if a local regulation merely 'create[s] a substantial . . . barrier' to the provision of services or 'allows a city to bar' provision of services,' then Section 253(a) preempts the regulation." *Id.* at 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176)).

The court of appeals then contended that "[*City of Auburn*'s] expansive reading of the preemptive effect of

§ 253(a) has had far-reaching consequences." App., *infra*, 9a. The court noted that "[t]hree of our sister circuits * * * have followed our broad interpretation of § 253(a), albeit with little discussion." *Ibid.* (citing *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003); and *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004)). The court also noted that, "[a]pplying our [*City of*] *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities." *Ibid.* (citing cases).

On the other hand, the court of appeals explained, the Eighth Circuit had "rejected the [*City of*] *Auburn* standard." App., *infra*, 10a (citing *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008)). The court concluded that the Eighth Circuit's critique of *City of Auburn* was "persuasive," reasoning that "Congress' use of the word 'may' * * * convey[s] the meaning that 'state and local regulations *shall not* prohibit or have the effect of prohibiting telecommunications services." *Ibid.* (emphasis added). The court also asserted that a "narrow" interpretation of Section 253(a) was "consistent with the FCC's." *Id.* at 11a (citing *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997)).

The court of appeals therefore overruled its earlier decision in *City of Auburn* and agreed with the Eighth Circuit that, in order to establish preemption, "a plaintiff * * * must show actual or effective prohibition, rather than the mere possibility of prohibition." App., *infra*, at 10a-11a (internal quotation marks and citation omitted). By contrast, under the court's standard, "a plaintiff's

showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Id.* at 13a. The court further noted that, because petitioner's claim constituted a "facial challenge to the [Wireless] Ordinance," it was subject to the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that "no set of circumstances exists under which the [challenged statute] would be valid." App., *infra*, 13a-14a.

Turning to the application of its standard, the court of appeals reasoned, with regard to the Wireless Ordinance's unfettered discretion, that "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of [the] ordinance." App., *infra*, 15a. Regarding the Wireless Ordinance's procedural requirements, the court similarly reasoned that, "[a]lthough a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application." *Ibid.* And regarding the Wireless Ordinance's substantive requirements, the court asserted that "[petitioner] has not identified a single requirement that effectively prohibits it from providing wireless services." *Id.* at 15a-16a.

The court of appeals suggested that a facial challenge could succeed if an ordinance "effect[ed] a significant gap in service coverage": for example, "[i]f an ordinance required * * * that all [wireless] facilities be underground" or "that no wireless facilities be located within one mile of a road." App., *infra*, 16a. Absent such a showing, however, the court concluded that "the [Wire-

less] Ordinance does not effectively prohibit [petitioner] from providing wireless services." *Ibid.*[4]

REASONS FOR GRANTING THE PETITION

The en banc Ninth Circuit held in this case that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. 253(a) only if it effects a complete ban on the provision of service. In so holding, the court of appeals expressly recognized that its interpretation of Section 253(a) conflicted with those of several other circuits. The court of appeals' analysis was deeply flawed, and the resulting rule promises to have substantial and harmful consequences for the telecommunications industry in general and the wireless industry in particular. This case, moreover, is an excellent vehicle for resolution of the circuit conflict concerning the interpretation of Section 253(a). In short, this case satisfies all of the Court's traditional criteria for granting review.

A. The Decision Below Conflicts With The Decisions Of Several Other Courts Of Appeals

In the decision below, the en banc Ninth Circuit held that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. 253(a) only if it effects a complete ban on the provision of service. App., *infra*, 16a. As the court expressly recognized, its "narrow" interpretation of Section 253(a) conflicts with the interpretations

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[4] Judge Gould concurred. App., *infra*, 17a. He reasoned that zoning ordinances could be preempted if "they would substantially interfere with the ability of the carrier to provide [telecommunications] services," but concluded, without elaboration, that "the record in this case shows that the telecommunications services here were not effectively barred by the zoning ordinance." *Ibid.*

of several other circuits. See *id.* at 9a, 11a. That clear and substantial circuit conflict warrants this Court's review.

1. Although they have used slightly different formulations of the applicable standard, three circuits—the First, Second, and Tenth—have held that a state or local regulation is preempted by 47 U.S.C. 253(a) if it substantially impedes an entity from providing telecommunications service.

In *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9 (2006), the First Circuit held that, for purposes of determining whether a regulation "ha[s] the effect of prohibiting the ability of any entity to provide any * * * telecommunications service," the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 18 (citing, *inter alia*, *In re California Payphone Association*, 12 F.C.C.R. 14,191, 14,206 (¶ 31) (1997)). The court added that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Ibid.* (citation omitted). Applying that standard, the court invalidated a local ordinance that imposed a 5% fee on gross revenues from all telephone calls originating within the locality (and required providers to comply with associated reporting requirements). *Id.* at 11-12, 23-24. The court reasoned that the ordinance would "negatively affect [the challenging provider's] profitability"; give rise to "a substantial increase in [the provider's] costs"; and "place a significant burden" on the provider. *Id.* at 18, 19.

Similarly, in *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67 (2002), cert. denied, 538 U.S. 923 (2003), the Second Circuit held that the test under Section 253(a) is whether a regulation "materially inhibits or

limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 76 (quoting *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). Like the First Circuit, the Second Circuit noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a))." *Ibid.* (citation omitted). The court proceeded to invalidate a local ordinance that subjected non-incumbent providers to a host of substantive and procedural requirements (and pursuant to which the locality sought to impose a 5% gross-revenues fee on the challenging provider). *Id.* at 71-73, 82. Notably, in invalidating the ordinance, the court focused on a provision that gave the local council the unfettered discretion to reject any application for a franchise. *Id.* at 76. The court concluded that the ordinance was preempted because it would pose "obstacles * * * to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

For its part, in *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258 (2004), the Tenth Circuit held that the relevant inquiry under Section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services." *Id.* at 1271 (quoting *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). The court also observed that "an absolute bar on the provision of services is not required." *Ibid.* Applying that standard, the court invalidated a local ordinance that required providers to register with the locality and obtain lease agreements before using public rights-of-way. *Id.* at 1262-1263, 1275. Like the Second Circuit, the Tenth Circuit focused on the fact that the ordinance contained a provision giving the locality "broad discretion in determining whether or not to accept a registration or lease application." *Id.* at 1270. The court reasoned that the

provision would "den[y] telecommunications providers the fair and balanced legal and regulatory environment the [Telecommunications Act] was designed to create" and that other provisions would "create a significant burden" and impose "substantial costs" on the challenging provider. *Id.* at 1270, 1271 (internal quotation marks and citation omitted).

2. The Eighth Circuit, by contrast, has expressly repudiated the approaches of the First, Second, and Tenth Circuits. In *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008), the Eighth Circuit contended that those circuits had "reach[ed] a conclusion contrary to a complete analysis of [Section 253(a)]." *Id.* at 533. The court reasoned that Section 253(a) could not be read to "result[] in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." *Ibid.* The court therefore concluded that it was insufficient for a provider challenging a regulation under Section 253(a) to show "the mere possibility of prohibition." *Ibid.*

Confusingly, however, the Eighth Circuit—like the circuits whose approaches it purported to be rejecting—recognized that Section 253(a) "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers," *Level 3 Communications*, 477 F.3d at 531-532; that a challenging provider "need not show a complete or insurmountable prohibition," *id.* at 533 (citing *TCG New York*, 305 F.3d at 76); and that the provider instead "must show an existing material interference with the ability to compete in a fair and balanced market," *ibid.* (citing *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). Still more confusingly, the court at one point suggested that the "material interference" standard was even *more*

exacting than the standard it was seemingly applying. See *id.* at 534 (concluding that there was "insufficient evidence from [the challenging provider] of any actual or effective prohibition, *let alone* one that materially inhibits its operations") (emphasis added). Although the Eighth Circuit purported to apply (and apparently did apply) a more stringent standard than the other circuits, it is thus somewhat unclear just how stringent that standard is in practice.

3. Like the Eighth Circuit, the en banc Ninth Circuit in this case expressly repudiated the approaches of the First, Second, and Tenth Circuits, see App., *infra*, 9a, and noted that it was insufficient for a challenging provider to show "the mere possibility of prohibition," *id.* at 10a-11a (quoting *Level 3 Communications*, 477 F.3d at 533). Unlike the Eighth Circuit, however, the Ninth Circuit did not suggest that a provider could satisfy Section 253(a) by showing that a regulation "material[ly] interfere[d] with" the ability of any entity to provide telecommunications service, or by identifying a prohibition that was short of "complete or insurmountable." *Level 3 Communications*, 477 F.3d at 533. Instead, the court overruled its earlier decision in *City of Auburn* (which, it noted, had recognized that a regulation could be preempted if it "create[d] a substantial . . . barrier" to the provision of telecommunications service, App., *infra*, 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176)), and held that a regulation is preempted by Section 253(a) only if it effects a complete ban on the provision of such service. *Id.* at 16a.[5]

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[5] While the Ninth Circuit suggested that a plaintiff could succeed in a challenge to a regulation if an ordinance "effect[ed] a significant gap in service coverage," App., *infra*, 16a, such a coverage gap would be tantamount to a complete ban, insofar as the carrier would be unable to provide any service in the area of the "gap" (and would

Regardless of how the Eighth Circuit's interpretation is characterized, therefore, it is clear that the Ninth Circuit's interpretation at a minimum conflicts with the interpretations of the First, Second, and Tenth Circuits. Because the decision below was issued by the en banc court, moreover, it is exceedingly unlikely that the Ninth Circuit will reconsider its interpretation. The resulting circuit conflict on the meaning of Section 253(a) merits this Court's review.

B. The Court Of Appeals' Interpretation Of Section 253(a) Is Erroneous

The en banc Ninth Circuit erred, moreover, by holding that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by Section 253(a) only if it effects a complete ban on the provision of such service. See App., *infra*, 16a.

1. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). As many courts have noted, the language of Section 253 in general—and Section 253(a) in particular—is far from clear. See, *e.g.*, *New Jersey Payphone Ass'n* v. *Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002); *City of Abilene* v. *FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). As this Court has already (if implicitly) recognized, however, the text of Section 253(a) comfortably accommodates an interpretation under which any regulation that substan-

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be unable to provide adequate service to the surrounding area). The Ninth Circuit did not identify any other circumstance in which a challenge to a regulation that stopped short of a complete ban would succeed under its standard.

tially impedes an entity from providing telecommunications service is preempted. See, *e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (noting that Section 253(a) "prohibits state and local regulation that *impedes* the provision of 'telecommunications service'") (emphasis added).

Such an interpretation of Section 253(a) is preferable to the Ninth Circuit's cramped interpretation for two principal reasons. First, that interpretation, unlike the Ninth Circuit's interpretation, gives meaningful content to the second clause of Section 253(a), which preempts regulations that have the "effect of prohibiting" the ability to provide telecommunications service (in contrast with the first clause, which preempts regulations that "prohibit" the ability to do so). Cf. *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 138 (2004) (rejecting a reading of Section 253(a) under which the provision "would often accomplish nothing"). Second, that interpretation better effectuates Congress's underlying policy objectives in enacting the Telecommunications Act in general (and Section 253(a) in particular): namely, to eliminate barriers to competition and to ensure that telecommunications providers would not be subject to intrusive state and local regulation. See pp. 2-4, *supra*; cf. *Nixon*, 541 U.S. at 138 (rejecting an interpretation under which Section 253(a) "would hold out no promise of a national consistency").

2. In adopting its avowedly "narrow" construction of Section 253(a), see App., *infra*, 11a, the Ninth Circuit committed several fundamental errors of statutory interpretation.

a. The Ninth Circuit criticized those decisions that had adopted a broader construction of Section 253(a) (including its prior decision in *City of Auburn*) on the ground that they attached excessive significance to the

provision's use of the word "may." See App., *infra*, 8a-11a. In so reasoning, however, the Ninth Circuit was attacking a strawman. Neither the *City of Auburn* nor the decisions of other circuits placed substantial weight on the use of the word "may"; instead, those decisions merely sought to give meaning to the successive phrase "have the effect of prohibiting." See *City of Auburn*, 260 F.3d at 1176 (holding that "[t]he ordinances at issue in the present case include several features that, in combination, have the effect of prohibiting the provision of telecommunications services"); see also *Puerto Rico Telephone*, 450 F.3d at 18; *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76.

Although the Ninth Circuit confidently asserted that the text of Section 253(a) is "unambiguous," see App., *infra*, 11a, it made no effort to explain why the "have the effect of prohibiting" clause of Section 253(a) should be limited to regulations that effect a complete ban, rather than regulations that erect "substantial . . . barrier[s]" to the provision of telecommunications service. *Id.* at 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176). Instead, the court merely stated (and repeatedly restated) the unobjectionable proposition that Section 253(a) preempts regulations that either "actually prohibit or effectively prohibit" the ability to provide such service. See, *e.g.*, *id.* at 11a (citation omitted).

b. The Ninth Circuit also erred by suggesting that its construction of Section 253(a) was "consistent with the FCC's." App., *infra*, 11a. In so doing, the court cited an FCC ruling for the generic proposition that Section 253(a) preempts regulations that either "actually prohibit or effectively prohibit" the ability to provide telecommunications service. *Ibid.* (citing *California Payphone Association*, 12 F.C.C.R. at 14,209 (¶ 38)).

In the same ruling on which the Ninth Circuit relied, however, the FCC made clear that, in determining whether a regulation "'has the effect of prohibiting' the ability of any entity to provide [telecommunications] service," it would "consider whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31).[6] While the Ninth Circuit suggested that the FCC's interpretation of Section 253(a) would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), see App., *infra*, 11a, it seemingly made no effort to come to terms with the FCC's actual interpretation of the operative statutory language.

c. The Ninth Circuit compounded its other interpretive errors by erroneously relying on the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), in order to narrow still further the

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[6] All of the other courts of appeals to have addressed the construction of Section 253(a) have discussed (and, to varying degrees, relied upon) the quoted language from the FCC's ruling in *California Payphone Association*. See *Level 3 Communications*, 477 F.3d at 533; *Puerto Rico Telephone*, 450 F.3d at 18; *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76. The FCC, moreover, has repeatedly cited (and relied upon) that language in subsequent rulings. See *In re Public Utility Comm'n*, 13 F.C.C.R. 3460, 3470 (¶ 22) (1997), petition for review denied, 164 F.3d 49 (D.C. Cir. 1999); *In re Low Tech Designs, Inc.*, 13 F.C.C.R. 1755, 1775-1776 (¶ 38) (1997); *In re Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1751-1752 (¶ 32) (1997), petition for review denied, 168 F.3d 1332 (D.C. Cir. 1999); *TCI Cablevision*, 12 F.C.C.R. at 21,439 (¶ 98); see also *In re Cheyenne River Sioux Tribe Telephone Auth.*, 17 F.C.C.R. 16,916, 16,936-16,937 (2002) (statement of Commissioner Copps).

standard for preemption under Section 253(a) in the context of a challenge to an ordinance. In *Salerno*, this Court held that a plaintiff bringing a facial challenge to a statute must show that the statute is invalid in all of its applications. See *id.* at 745. Section 253(a), however, expressly preempts any "statute," "regulation," or other "legal requirement" that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications services. By its terms, therefore, Section 253(a) provides the entire substantive standard for a preemption challenge to a statute or regulation (such as the San Diego County Wireless Ordinance), without any need to import *Salerno* into the analysis. The Ninth Circuit thus erred by relying on *Salerno* to reach the conclusion that the Wireless Ordinance could not be preempted unless it effectively resulted in a complete ban on the provision of telecommunications service. See, *e.g.*, App., *infra*, 16a. This Court should grant review in order to eliminate the resulting circuit conflict and correct the Ninth Circuit's seriously flawed interpretation.

C. The Question Presented Is An Important One That Is Ripe For This Court's Review

The question presented in this case—*i.e.*, whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service—is a recurring one of obvious importance to the telecommunications industry. As noted above, Section 253(a) is widely recognized as one of the most significant provisions of the Telecommunications Act of 1996. See p. 3, *supra*. The interpretation of Section 253(a) has a direct effect on the ability of telecommunications providers to offer more, and more advanced, telecommunications services, consistent with the overriding purpose of the Telecommunications Act. Indeed, the

willingness of telecommunications providers to make investments in new technologies in the first place depends crucially on their ability to implement those technologies free of interference from state and local law. At a minimum, therefore, the question presented here is comparable in importance to questions this Court has previously considered concerning the interpretation of this or other provisions of the Telecommunications Act. Cf., *e.g.*, *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005) (whether an individual may enforce the limitations in 47 U.S.C. 332(c)(7) through an action under 42 U.S.C. 1983); *Nixon*, 541 U.S. at 125 (whether the phrase "any entity" in Section 253(a) includes political subdivisions of States).

Because state and local governments have continually sought to impose restrictions on the operations of telecommunications companies, moreover, questions concerning the scope of preemption under Section 253(a) arise with remarkable frequency. As the en banc Ninth Circuit recognized in the decision below, lower courts have considered challenges to local regulations under Section 253(a) "in tens of cases across this nation's towns and cities," App., *infra*, 9a (citing cases), and numerous other cases are currently pending nationwide, see, *e.g.*, *Newpath Networks LLC* v. *City of Irvine*, Nos. 08-55755 & 08-56010 (9th Cir. appeal filed May 2, 2008) (challenge to local wireless ordinance); *NextG Networks of California, Inc.* v. *City of Huntington Beach*, No. 8:07-cv-01471 (C.D. Cal. filed Dec. 27, 2007) (same); *New York SMSA Limited Partnership* v. *Town of Clarkstown*, No. 7:07-cv-07637-CS (S.D.N.Y. filed Aug. 28, 2007) (same). Especially in light of the ongoing proliferation of litigation, this Court's intervention is warranted in order to provide definitive resolution concerning the interpretation of Section 253(a).

This Court's intervention is especially warranted because the current inconsistency in the interpretation of Section 253(a) among the circuits itself disserves one of the primary objectives of the Telecommunications Act: namely, to avoid subjecting telecommunications providers in general (and wireless providers in particular) to "an inconsistent and, at times, conflicting patchwork of requirements," depending on where the providers' facilities are located. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995). As matters currently stand, in the Ninth Circuit, virtually any regulation that does not expressly prohibit the provision of telecommunications service (with the exception of an entirely fanciful regulation providing that "all [wireless] facilities be underground" or that "no wireless facilities be located within one mile of a road," App., *infra*, 16a) will be upheld as not preempted by Section 253(a). By contrast, in the First, Second, and Tenth Circuits (and possibly even in the Eighth Circuit), a regulation that substantially impedes the provision of telecommunications service will be invalidated, even if it does not result in a complete ban. The resulting disuniformity necessitates immediate intervention without further percolation.

Finally, if the decision below is allowed to stand, it threatens to embolden localities in the Nation's largest and most populous circuit—and, indeed, beyond—to enact burdensome ordinances similar to the County of San Diego's. In fact, in the short time since the decision below, the City of Berkeley, California, has already withdrawn proposed changes to its preexisting wireless ordinance that would have eliminated some of its most onerous requirements—changes that, ironically enough, were initially proposed in response to the panel's opinion. See Memorandum from Wendy Cosin, Deputy Planning Director, to Members of the Berkeley Planning Commis-

sion, at 1-3 (Nov. 5, 2008) <http://www.tinyurl.com/berkeleymemo>. As noted above, moreover, litigation concerning other ordinances is currently ongoing in courts in the Ninth Circuit—and the decision below will obviously make it more difficult for the challenges to those ordinances to succeed. See p. 22, *supra*. In light of the clear and substantial circuit conflict concerning the scope of Section 253(a) and the vital importance of the question presented, further review is plainly warranted.

D. This Case Is An Ideal Vehicle For Considering The Question Presented

Should the Court decide to resolve the circuit conflict concerning the interpretation of Section 253(a), this case is an optimal vehicle for the Court's review.

1. This case cleanly presents the question whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service, and it is clear that the resolution of that question would be outcome-dispositive here. As the district court and the court of appeals panel correctly determined, the San Diego County Wireless Ordinance contains numerous features that, when viewed either collectively or in isolation, erect substantial obstacles to the provision of wireless service. See App., *infra*, 47a-48a (court of appeals panel); *id.* at 70a-74a (district court).

Most notably, the Wireless Ordinance imposes a host of substantive and procedural requirements for the placement and design of wireless facilities, ranging from the requirement that a provider agree to share the proposed facility with other providers, Zoning Ord. § 6984(c)(9), to the requirement that the provider supply a "visual impact analysis" and a detailed narrative with information about the facility's design and maintenance, *id.* § 6984(b)-(c). Lower courts applying a substantial-

impediment standard have routinely invalidated such elaborate requirements under Section 253(a). See, *e.g.*, *Qwest Communications, Inc.* v. *City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006); *City of Santa Fe*, 380 F.3d at 1270; *City of Auburn*, 260 F.3d at 1175-1176. The burden imposed by those substantive and procedural requirements is compounded by the fact that the County retains the discretion to grant or deny any application requiring a use permit based on "[a]ny * * * relevant impact of the proposed use," Zoning Ord. § 7358(a)(6), and to revoke or modify the permit at any time, *id.* § 7382. As courts have noted in invalidating similar provisions, such unfettered discretion constitutes the "ultimate cudgel" that a locality may use to deny the provision of wireless service. *City of Auburn*, 260 F.3d at 1176; see, *e.g.*, *City of Santa Fe*, 380 F.3d at 1270. Because the Wireless Ordinance constitutes nothing less than a shadow regulatory regime for the provision of wireless services within San Diego County, there can be no doubt that it substantially impedes the provision of telecommunications service within the county. Under the correct interpretation of Section 253(a), therefore, the Wireless Ordinance would comfortably be held to be preempted.

Before the court of appeals, respondents contended that petitioner's preemption claim was governed not by Section 253(a), but rather by 47 U.S.C. 332(c)(7), which provides, in the specific context of "decisions" concerning the placement of wireless facilities, that a state or local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." App., *infra*, 7a. To the extent respondents renew that contention before this Court, however, it would not give rise to any sort of vehicle problem. As a preliminary

matter, that contention plainly lacks merit.[7] But more broadly, as the en banc court of appeals noted, the "relevant" language in each provision—*i.e.*, that a state or local regulation that either prohibits or effectively prohibits the provision of services is preempted—is "identical." See *id.* at 13a. Because "the legal standard is the same under either [provision]," the en banc court of appeals ultimately (and correctly) held that it was unnecessary to address respondents' contention. *Ibid.* For the same reason, this Court would not need to address that contention either, and there is therefore no obstacle to the Court's reaching, and resolving, the question presented here.

2. The question presented in this case is also presented in another petition currently pending before the Court. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, No. 08-626 (filed Nov. 7, 2008). That case involves a challenge by a non-incumbent landline provider to a particular licensing agreement with a local government, pursuant to which the provider agreed to pay certain fees, and to submit to certain regulatory requirements, as a condition of obtaining access to public rights-of-way. See *Level 3 Communications*, 477 F.3d at 530-531 (08-626 Pet. App. 24a-25a). At a minimum, the Court should grant review in this case, because it is an ideal

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[7] That is because Section 253(a) applies to challenges to "statutes" and "regulations" (such as the San Diego County Wireless Ordinance), whereas Section 332(c)(7) applies only to challenges to particular "decisions" made by local authorities. As the court of appeals panel explained, therefore, respondents' contention "ignores the plain meaning and structure of the [Telecommunications Act]." App., *infra*, 40a. Tellingly, respondents have cited no decision holding that a provider may bring a preemption claim like petitioner's only under Section 332(c)(7) and not under Section 253(a).

vehicle for resolving the circuit conflict concerning the interpretation of Section 253(a). Because *Level 3 Communications* arises in a distinct but complementary factual context, the Court may wish to grant review in that case as well (and to consolidate the cases for briefing and oral argument).

Level 3 Communications, however, presents one additional complication that this case does not. Because the provider in *Level 3 Communications* was specifically seeking access to public rights-of-way, that case implicates the meaning not only of Section 253(a), but also of Section 253(c), which preserves the authority of state and local governments to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers[] on a competitively neutral and nondiscriminatory basis." 47 U.S.C. 253(c).

In its petition before this Court, the provider in *Level 3 Communications* asks the Court not only to resolve the circuit conflict concerning the interpretation of Section 253(a), but also an additional (and less substantial) circuit conflict on the issue whether a regulation may be preempted under Section 253(c) regardless whether it falls within the scope of Section 253(a). See 08-626 Pet. 23, 29-30.[8] And the provider appears to go further and to encourage the Court to address fact-intensive issues concerning whether the requirements in that case were "saved" by Section 253(c), regardless whether Section

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[8] The provider in *Level 3 Communications* does not appear to have contended before the Eighth Circuit that Section 253(c) provided a discrete basis for preemption. To the contrary, in its brief on appeal, the provider asserted that the Sixth Circuit's decision in *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (2000)—the sole court of appeals decision to adopt such a rule—was "largely devoid of any analysis." Br. of Appellee at 39, *Level 3 Communications*, *supra* (Nos. 06-1398 & 06-1459).

253(c) merely creates an exception to preemption under Section 253(a) or provides a discrete basis for preemption. Specifically, the provider seemingly asks the Court to consider (and decide) whether the challenged fees constitute "fair and reasonable compensation," and whether the challenged regulatory requirements constitute "manage[ment] [of] the public rights-of-way * * * on a competitively neutral and nondiscriminatory basis." See *id.* at 21-23.[9] This case, by contrast, presents only the pure legal issue concerning the interpretation of Section 253(a), shorn of any potentially complicating legal or factual issues concerning the interpretation or application of Section 253(c).[10]

Regardless whether the Court grants the petition in *Level 3 Communications*, however, it should grant the instant petition. This case particularly merits review because it arises in perhaps the most important context in which Section 253(a) currently applies: namely, the preemption of local regulations targeted at the wireless communications industry. Although the wireless industry constituted only a fraction of the overall telecommunications industry at the time the Telecommunications

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[9] The district court in *Level 3 Communications* held that some of the challenged requirements, but not others, were saved by Section 253(c). See 405 F. Supp. 2d 1047, 1056-1063 (E.D. Mo. 2005) (08-626 Pet. App. 49a-67a). The court of appeals did not reach any issue concerning the application of Section 253(c), in light of its holding that the provider had failed to establish preemption under Section 253(a). See 477 F.3d at 534 & n.2 (08-626 Pet. App. 33a & n.2).

[10] Although petitioner in this case claimed in its complaint that the San Diego County Wireless Ordinance discriminated against some providers using public rights-of-way, in violation of Section 253(c), petitioner abandoned that claim on appeal, and respondents did not contend on appeal that the Wireless Ordinance was saved by Section 253(c). See pp. 7 n.2 & 8 n.3, *supra*.

Act of 1996 was enacted, there are now more than 241 million mobile telephone users in the United States, and nearly the entire population lives in areas in which mobile telephone service is provided. See FCC, Twelfth Annual Report on the State of Competitive Market Conditions With Respect to the Wireless Industry, Report No. 08-28, at 5, 6 (2008) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf>.

The demand for wireless services continues to grow, and, in order to satisfy that demand (and to provide access to new technologies), wireless providers are under continual pressure to expand and improve their networks. At the same time, however, local communities are often resistant, even openly hostile, to the construction or modification of wireless facilities. See Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445, 454 (2005) (noting that, "[w]hile the majority of adult Americans now enjoy the benefits of wireless communications," those benefits are "vulnerable to more parochial concerns" and local governments "are in a practical position to block or hinder the national telecommunications network"); see also, *e.g.*, Malcolm J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887 (1999).

As a practical matter, the Court's decision in this case will determine how far local governments can go in imposing restrictions on the placement and design of wireless facilities. If the Ninth Circuit's decision is allowed to stand, one of the central promises of the Telecommunications Act—that wireless providers can offer services free of intrusive and inconsistent state and local regulation—will go unfulfilled. The question presented in this case is of obvious and enormous practical and legal significance. This case therefore warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL T. PASCUCCI
NATHAN R. HAMLER
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
3580 Carmel Mountain Road, Suite 300
San Diego, CA 92130
(858) 314-1500

KANNON K. SHANMUGAM
THOMAS J. ROBERTS
SARAH F. TEICH
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

DECEMBER 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 05-56075, 05-56435

SPRINT TELEPHONY PCS, L.P., A DELAWARE LIMITED PARTNERSHIP, PLAINTIFF-APPELLANT/CROSS-APPELLEE, AND PACIFIC BELL WIRELESS LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA CINGULAR WIRELESS, PLAINTIFF,

v.

COUNTY OF SAN DIEGO, A DIVISION OF THE STATE OF CALIFORNIA; GREG COX, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; DIANNE JACOB, IN HER CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; PAM SLATER, IN HER CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; RON ROBERTS, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; BILL HORN, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO, DEFENDANTS-APPELLEES/CROSS-APPELLANTS.

Filed: Sept. 11, 2008

Before: ALEX KOZINSKI, Chief Judge, and ANDREW J. KLEINFELD, HAWKINS, A. WALLACE TASHIMA, SIDNEY R. THOMAS, BARRY G.

SILVERMAN, SUSAN P. GRABER, RONALD M. GOULD, MARSHA S. BERZON, RICHARD C. TALLMAN, and JAY S. BYBEE, Circuit Judges.

Opinion by Judge GRABER; Concurrence by Judge GOULD.

GRABER, Circuit Judge.

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) ("the Act"), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, Defendant County of San Diego enacted its Wireless Telecommunications Facilities ordinance. San Diego County Ordinance No. 9549, § 1 (codified as San Diego County Zoning Ord. §§ 6980-6991, 7352 ("the Ordinance")). The Ordinance imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of this court affirmed. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). We granted rehearing en banc, 527 F.3d 791 (9th Cir. 2008), and we now reverse.

FACTUAL AND PROCEDURAL HISTORY

The County of San Diego enacted the Ordinance "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications

facilities in all zones within the County of San Diego." San Diego County Ordinance No. 9549, § 1. The Ordinance categorizes applications for wireless telecommunications facilities into four tiers, depending primarily on the visibility and location of the proposed facility. San Diego County Zoning Ordinance § 6985. For example, an application for a low-visibility structure in an industrial zone generally must meet lesser requirements than an application for a large tower in a residential zone. *Id.*

Regardless of tier, the Ordinance imposes substantive and procedural requirements on applications for wireless facilities. For example, non-camouflaged poles are prohibited in residential and rural zones; certain height and setback restrictions apply in residential zones; and no more than three facilities are allowed on any site, unless "a finding is made that co-location of more facilities is consistent with community character." *Id.* An applicant is required to identify the proposed facility's geographic service area, to submit a "visual impact analysis," and to describe various technical attributes such as height, maintenance requirements, and acoustical information, although some exceptions apply. *Id.* § 6984. The proposed facility must be located within specified "preferred zones" or "preferred locations," unless those locations are "not technologically or legally feasible" or "a finding is made that the proposed site is preferable due to aesthetic and community character compatibility." *Id.* § 6986. The proposed facility also must meet many design requirements, primarily related to aesthetics. *Id.* § 6987. The applicant also must perform regular maintenance of the facility, including graffiti removal and proper landscaping. *Id.* § 6988.

General zoning requirements also apply. For example, hearings are conducted before a permit is granted,

id. § 7356, and on appeal, if requested, *id.* § 7366(h). Before a permit is granted, the zoning board must find:

> That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;
>
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use[.]

Id. § 7358(a). The decision-maker retains discretionary authority to deny a use permit application or to grant the application conditionally. *Id.* § 7362.

Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates 47 U.S.C. § 253(a)[1] because, on its face, it prohibits or has

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[1] In its complaint, Sprint also alleged that the Ordinance violated another subsection of 47 U.S.C. § 253. The district court dismissed that cause of action for failure to prosecute, and Sprint does not challenge that dismissal on appeal.

the effect of prohibiting Sprint's ability to provide wireless telecommunications services. Sprint sought injunctive and declaratory relief under the Supremacy Clause and 28 U.S.C. § 1331, and damages and attorney fees under 42 U.S.C. § 1983. The County argued that § 253(a) did not apply to the Ordinance, because 47 U.S.C. § 332(c)(7) exclusively governs wireless regulations, and that, in any event, the Ordinance is not an effective prohibition on the provision of wireless services. The County also argued that damages and attorney fees are unavailable because Congress did not create a private right of action enforceable under 42 U.S.C. § 1983.

The district court first held that facial challenges to a local government's wireless regulations could be brought under either § 253(a) or § 332(c)(7), because neither is exclusive. The district court next held, relying on our decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), that the Ordinance violated § 253(a). The district court therefore permanently enjoined the County from enforcing the Ordinance against Sprint. Finally, the district court held that a claim under 42 U.S.C. § 1983 for a violation of § 253(a) was not cognizable and granted summary judgment to the County on that claim. The parties cross-appealed. A three-judge panel of this court affirmed, and we granted rehearing en banc.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's grant of a permanent injunction, but review its underlying determinations "by the standard that applies to that determination." *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

DISCUSSION

Sprint argues that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. As a threshold issue, the parties dispute *which* provision of the Act—47 U.S.C. § 253(a) or 47 U.S.C. § 332(c)(7)(B)(i)(II)—applies to this case.

A. *The Effective Prohibition Clauses of 47 U.S.C. § 253(a) and 47 U.S.C. § 332(c)(7)(B)(i)(II)*

When Congress passed the Act, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56; *see also Ting*, 319 F.3d at 1143 ("[T]he purpose of the . . . Act is to 'provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.' " (quoting H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124)). The Act "represents a dramatic shift in the nature of telecommunications regulation." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); *see also Ting*, 319 F.3d at 1143 (characterizing the Act as a "dramatic break with the past"). Congress chose to "end[ ] the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part).

Congress did so by enacting 47 U.S.C. § 253, a new statutory section that preempts state and local regulations that maintain the monopoly status of a telecommu-

nications service provider. *See Cablevision of Boston*, 184 F.3d at 98 ("Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers . . . Section 253(a) takes that choice away from them . . . . "). Section 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

The Act also contained new provisions applicable only to *wireless* telecommunications service providers. The House originally proposed legislation requiring the Federal Communications Commission ("FCC") to regulate directly the placement of wireless telecommunications facilities. *See* H.R. Rep. No. 104-204(I), § 107, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. But the House and Senate conferees decided instead to "preserve[ ] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." H.R. Rep. No. 104-458, § 704, at 207-08 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

Accordingly, at the same time, Congress also enacted 47 U.S.C. § 332(c)(7). Section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations in § 332(c)(7)(B). One such limitation is that local regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.* § 332(c)(7)(B)(i)(II).

We have interpreted § 332(c)(7)(B)(i)(II) in accordance with its text. In *MetroPCS, Inc. v. City of San*

Francisco, 400 F.3d 715, 730-31 (9th Cir. 2005), we held that a locality runs afoul of that provision if (1) it imposes a "city-wide general ban on wireless services" or (2) it actually imposes restrictions that amount to an effective prohibition.

Our interpretation of § 253(a), however, has not hewn as closely to its nearly identical text. Again, § 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In *Auburn*, we became one of the first federal circuit courts to interpret that provision. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. *Auburn*, 260 F.3d at 1175-76. In the course of doing so, we quoted § 253(a) somewhat inaccurately, inserting an ellipsis in the text of § 253(a). *Id.* at 1175. We held that "[s]ection 253(a) preempts 'regulations that not only "prohibit" outright the ability of any entity to provide telecommunications services, but also those that "may ... have the effect of prohibiting" the provision of such services.' " *Id.* (quoting *Bell Atl.-Md., Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D.Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)); *see also Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1258 (9th Cir. 2006) (invalidating the locality's regulations because they "may have the effect of prohibiting telecommunications companies from providing services"); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasizing that "regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]"). It followed from that truncated version of the statute that, if a local regulation merely "create[s] a substantial

. . . barrier" to the provision of services or "allows a city to bar" provision of services, *Auburn*, 260 F.3d at 1176, then § 253(a) preempts the regulation. Applying that broad standard, we held that the municipal regulations at issue in *Auburn* were preempted because they imposed procedural requirements, charged fees, authorized civil and criminal penalties, and—"the ultimate cudgel"—reserved discretion to the city to grant, deny, or revoke the telecommunications franchises. *Id.*

Our expansive reading of the preemptive effect of § 253(a) has had far-reaching consequences. The *Auburn* standard has led us to invalidate several local regulations. *See Berkeley*, 433 F.3d at 1258 (holding that Berkeley's regulations were preempted by § 253(a)); *Portland*, 385 F.3d at 1239-42 (reversing the district court's holding that Portland's regulations survived preemption and remanding for additional analysis). Three of our sister circuits also have followed our broad interpretation of § 253(a), albeit with little discussion. *See P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004)); *Santa Fe*, 380 F.3d at 1270 (quoting *Auburn*, 260 F.3d at 1176); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). Applying our *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities. *See, e.g., NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240, 1253 (C.D. Cal. 2007); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 481-84 (N.D.N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003).

But the tension between the *Auburn* standard and the full text of § 253(a) has not gone unnoticed. *See City*

of Portland v. Elec. Lightwave, Inc., 452 F. Supp. 2d 1049, 1059 (D. Or. 2005) ("The Ninth Circuit's interpretation of the scope of section 253(a) appears to depart from the plain meaning of the statute . . . . "); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002) (construing the *Auburn* standard as dictum because reading § 253(a) as preempting regulations that *may* have the effect of prohibiting telecommunications services "simply misreads the plain wording of the statute"), *rev'd by Portland*, 385 F.3d at 1241 ("Like it or not, both we and the district court are bound by our prior ruling [in *Auburn*]."); *see also Newpath Networks LLC v. City of Irvine*, No. SACV-06-550, 2008 WL 2199689, at *4 (C.D. Cal. Mar. 10, 2008) (noting that "the Court is sympathetic to Irvine's argument that judicial decisions in this area have not been particularly instructive in telling municipalities how they may regulate in accordance with the . . . Act"). Recently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007); *see also AT&T Commc'ns of Pac. Nw., Inc. v. City of Eugene*, 177 Or. App. 379, 35 P.3d 1029, 1047-48 (2001) (implicitly rejecting the *Auburn* standard).

We find persuasive the Eighth Circuit's and district courts' critique of *Auburn*. Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting . . . provi[sion of] . . . telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications ser-

vice." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns*, 477 F.3d at 532.

Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's. *See In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (holding that the two-step *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), analysis applies to FCC rulings). Were the statute ambiguous, we would defer to the FCC under *Chevron*, as its interpretation is certainly reasonable. 467 U.S. at 843. Our narrow interpretation of the preemptive effect of § 253(a) also is consistent with the presumption that "express preemption statutory provisions should be given a narrow interpretation." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005).

Our present interpretation of § 253(a) is buttressed by our interpretation of the same relevant text in § 332(c)(7)(B)(i)(II)—"prohibit or have the effect of prohibiting." In *MetroPCS*, to construe § 332(c)(7)(B)(i)(II), we focused on the *actual* effects of the city's ordinance, not on what effects the ordinance *might possibly* allow. 400 F.3d at 732-34. Indeed, we rejected the plaintiff's argument that, because the city's zoning ordinance

granted discretion to the city to reject an application based on vague standards such as "necessity," the ordinance necessarily constituted an effective prohibition. *Id.* at 724, 732. Consequently, our interpretation of the "effective prohibition" clause of § 332(c)(7)(B)(i)(II) differed markedly from *Auburn's* interpretation of the same relevant text in § 253(a). *Compare MetroPCS*, 400 F.3d at 731-35 (analyzing, under § 332(c)(7)(B)(i)(II), whether the city's ordinance and decision *actually* have the effect of prohibiting the provision of wireless services), *with Portland*, 385 F.3d at 1241 ("[R]egulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]."); *compare also MetroPCS*, 400 F.3d at 732 (rejecting the argument that "the City's zoning 'criteria,' which allow for [permit] denials based on findings that a given facility is 'not necessary' for the community, are 'impossible for any non-incumbent carrier to meet' and thus constitute an effective prohibition of wireless services"), *with Auburn*, 260 F.3d at 1176 (holding that the city's ordinance is an effective prohibition under § 253(a), in large part because the "city reserves discretion to grant, deny, or revoke the [telecommunications] franchises").

When Congress uses the same text in the same statute, we presume that it intended the same meaning. *See N. Sports, Inc. v. Knupfer (In re Wind N' Wave)*, 509 F.3d 938, 945 (9th Cir. 2007) (applying the presumption); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("We must presume that words used more than once in the same statute have the same meaning."); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is

enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *id.* at 261 (O'Connor, J., concurring in the judgment) (stating that the presumption should apply in the absence of "strong evidence" to the contrary). We see nothing suggesting that Congress intended a different meaning of the text "prohibit or have the effect of prohibiting" in the two statutory provisions, enacted at the same time, in the same statute.

Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II).[2] Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.

Because Sprint's suit hinges on the statutory text that we interpreted above—"prohibit or have the effect of prohibiting"—we need not decide whether Sprint's suit falls under § 253 or § 332. As we now hold, the legal standard is the same under either.

B. *The Effective Prohibition Standard Applied to the County of San Diego's Ordinance*

Having established the proper legal standard, we turn to Sprint's facial challenge to the Ordinance. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists

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[2] We make no comment on what differences, if any, exist between the two statutory sections in other contexts.

under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[3]

The Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not.

The Ordinance imposes a layer of requirements for wireless facilities in addition to the zoning requirements for other structures. On the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction of sufficient facilities to provide wireless services to the County of San Diego.

Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is in-

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[3] The Supreme Court and this court have called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971-72 (9th Cir. 2003). In cases involving federal preemption of a local statute, however, the rule applies with full force. *See Hotel & Motel Ass'n*, 344 F.3d at 971 ("To bring a successful facial challenge outside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" (alteration in original) (quoting *Salerno*, 481 U.S. at 745)); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (unanimous opinion) (applying *Salerno* to a federal preemption facial challenge to a state statute).

volved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance-the provision of wireless services and other valid public goals such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that "no set of circumstances exists under which the [Ordinance] would be valid," *Salerno*, 481 U.S. at 745, simply because the zoning board exercises some discretion.

The same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).

We are equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effec-

tively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest setbacks, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

That is not to say, of course, that a plaintiff could never succeed in a facial challenge. If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition. We have held previously that rules effecting a "significant gap" in service coverage could amount to an effective prohibition, *MetroPCS*, 400 F.3d at 731-35, and we have no reason to question that holding today.

In conclusion, the Ordinance does not effectively prohibit Sprint from providing wireless services. Therefore, the Act does not preempt the County's wireless telecommunications ordinance.

C. *Section 1983 claim*

We adopt the reasoning and conclusion of the three-judge panel that 42 U.S.C. § 1983 claims cannot be brought for violations of 47 U.S.C. § 253. *Sprint Telephony*, 490 F.3d at 716-18; *accord Santa Fe*, 380 F.3d at 1266-67; *see also Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 812-15 (9th Cir. 2007) (holding that § 1983 claims cannot be brought for violations of 47 U.S.C. § 332).

AFFIRMED with respect to the § 1983 claim; otherwise **REVERSED**. Costs on appeal awarded to Defendants-Appellees/Cross-Appellants.

GOULD, Circuit Judge, concurring.

I concur in full in Judge Graber's majority opinion, holding that Section 253(a) preempts any state or local law that actually or effectively prohibits provision of telecommunication services. I write separately to add my view that normally local governments will have the ability to enforce reasonable zoning ordinances that might affect where and how a cellular tower is located, but that will not effectively prohibit cellular telephone service. Zoning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-56076, 05-56435

SPRINT TELEPHONY PCS, L.P., A DELAWARE LIMITED PARTNERSHIP, PLAINTIFF-APPELLANT-CROSS-APPELLEE, AND PACIFIC BELL WIRELESS LLC, A NEVADA LIMITED LIABILITY COMPANY, D/B/A CINGULAR WIRELESS, PLAINTIFF,

v.

COUNTY OF SAN DIEGO; GREG COX, IN HIS CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; DIANNE JACOB, IN HER CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; PAM SLATER, IN HER CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; RON ROBERTS, IN HIS CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; BILL HORN, IN HIS CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO, DEFENDANTS-APPELLEES-CROSS-APPELLANTS.

Filed: March 13, 2007
Amended: June 13, 2007

ORDER

Before MYRON H. BRIGHT,[1] A. WALLACE TASHIMA, and CARLOS T. BEA, Circuit Judges.

The unopposed motion of the National League of Cities and eight other organizations for leave to file an *Amici Curiae* brief is granted, and their *amici* brief in support of the petition for panel rehearing and rehearing *en banc*, received by the Clerk on April 12, 2007, concurrently with the filing of the motion, is ordered filed. The motion of appellee County of San Diego for leave to file reply in support of its petition for rehearing and rehearing *en banc* is denied.

The opinion filed March 13, 2007, and reported at 479 F.3d 1061, is hereby amended. The attached amended opinion is filed concurrently with this order.

With the filing of the amended opinion, the petition for panel rehearing is denied. No further petitions for panel rehearing will be entertained. The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for rehearing en banc is denied, without prejudice to a petition for rehearing en banc as to the amended opinion.

AMENDED OPINION

BRIGHT, Circuit Judge:

Sprint Telephony PCS sought an injunction in the district court to prevent San Diego County ("the County") from enforcing its Wireless Telecommunications Facilities zoning ordinance ("WTO"). The district court granted a permanent injunction, agreeing with Sprint that the WTO's regulation of wireless facility

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[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

placement violated § 253(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of U.S.C. Titles 15, 18, & 47) ("TCA"). But, the court held that § 253(a) did not create a private right of action and thus denied Sprint's 42 U.S.C. § 1983 claim for money damages and attorney's fees. *See Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886 (S.D. Cal. 2005). Sprint appeals the denial of its § 1983 claim, and the County cross-appeals seeking reversal of the order granting the permanent injunction. We conclude that the burdens imposed by the WTO were sufficient to sustain a facial challenge under § 253(a) and that Congress did not intend to permit enforcement of § 253(a) through a § 1983 damages action. We accordingly affirm the district court.

I.

Today's wireless age began when Guglielmo Marconi developed a way for ships to communicate over radio waves in 1895. *See* PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 10, 861 (2d ed. 1999) (hereinafter "HUBER"). Mobile technology in the United States initially relied on single-cell transmission, which severely limited the number of subscribers who could utilize the system. It was not until December 1947 that Bell Labs scientist D.H. Ring conceptualized cellular telecommunications in an internal technical memorandum. *See 1946: First Mobile Telephone Call, available at* http://www.corp.att.com/attlabs/reputation/timeline/46mobile.html (last visited Mar. 5, 2007). Ring's system employed multiple transmission sites and re-used frequencies, overcoming the limitations of the single-cell transmission system that was constrained by the number of channels available within the radio spectrum first allo-

cated to mobile communications by the Federal Communications Commission ("FCC") in 1949. *See* HUBER at 862 (citing General Mobile Radio Service, *Report and Order of the Commission*, 13 F.C.C. 1190 (1949)). Ring's concept did not, however, replace the single-cell model until the 1980s. *See* HUBER at 864. Before cellular technology took hold, the radio spectrum dedicated to mobile communications supported only 140,000 subscribers. *Id.*

A. The Development of Cellular Technology

Nationwide wireless capacity grew as providers adopted cellular technology and as the FCC gradually expanded the radio spectrum available to mobile telecommunications. *See id.* at 903-08; *see also* FCC, *Cellular Services: Band Plan*, *available at* http://wireless.fcc.gov/services/index.htm?job=service_bandplan&id=cellular (last visited Mar. 5, 2007). In June 1985, when the Cellular Telecommunication Industry Association ("CTIA") began its semi-annual survey of the industry, the CTIA reported 203,600 domestic cellular subscribers. *See* CTIA, *Background on CTIA's Semi-Annual Wireless Industry Survey*, *available at* http://files.ctia.org/pdf/CTIAMidYear2006Survey.pdf (last visited Mar. 5, 2007) ("CTIA Survey"). By June 2006, as we prepared to hear this appeal, that number had grown to 219,420,457. *Id.*

The corresponding infrastructure necessary to support today's cellular technology is extensive. Cellular telecommunications takes its name from the network of hexagonal cells, which "resemble honeycombs," blanketing the coverage area. *See* Jeffrey Berger, *Efficient Wireless Tower Sitting: An Alternative to Section 332(c)(7) of the Telecommunications Act of 1996*, 23 TEMP. ENVTL. L. & TECH. J. 83, 87 (2004). Each cell contains an antenna tower, which emits and receives signals

to and from the subscribers within its geographic area. *Id.* As Ring originally proposed, users are seamlessly passed from tower to tower as they move within the system. *Id.* Approximately 200,000 cellular sites currently support more than 200 million subscribers nationwide. *See CTIA Survey.*

The growing demand for cellular service requires the construction of additional cellular sites, which has met with opposition in some communities. *See* Berger at 86 (describing the opposition to cellular towers). Congress addressed growing concern that the lack of a national wireless policy inhibited growth of the industry in provisions of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6001-03, 107 Stat. 312 (1993). The provisions, in addition to expanding the radio spectrum available to wireless carriers, amended section 332 of the Communications Act of 1934, 47 U.S.C. § 332, to address the "regulatory treatment of mobile services." *See* § 6002, 107 Stat. at 392-95 (codified at 47 U.S.C. § 332(c) (1988 & Supp. V 1993)).

B. The Telecommunications Act of 1996

Congress reaffirmed its commitment to nationwide telecommunications and cellular service when it passed the TCA in 1996. It announced its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56 (1996). The TCA, which also amended the Communications Act of 1934, in part added a section expressly preempting state and local regulations that have the effect of prohibiting any telecommunications service:

§ 253 Removal of Barriers to Entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)

> or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.
>
> (e) Commercial mobile service providers
>
> Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

§ 101, 110 Stat. at 70-71 (codified at 47 U.S.C. § 253(a)-(e) (1994 & Supp. II 1996)) (hereinafter "removing barriers"). Congress, by preempting state and local statutes, "ended the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); *see also Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88, 97-98 (1st Cir. 1999) (explaining that § 253 implements Congress's "free market vision" by preventing states and localities from maintaining the "monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service," *id.* at 98).

In addition to § 253(a), which protects all common carriers, the TCA amended the code provisions applicable to only mobile services. *See* 47 U.S.C. § 332(c) (1994 & Supp. II 1996). Prior to passage of the TCA, § 332 included, among other provisions, the factors the FCC must consider as it manages the electromagnetic spectrum assigned to private mobile services. *See id.* § 332(a) (1994). Section 332 also required commercial mobile service providers to be treated as common carriers (subject to limited exceptions that the FCC may establish). *See*

id. § 332(c) (1994). The TCA, though, added subsection (c)(7), which expressly preserves the authority of local governments to make decisions, subject to certain limitations, regarding the placement of wireless service facilities:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instru-

mentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

§ 704, 110 Stat. at 151-52 (codified at 47 U.S.C. § 332(c)(7) (1994 & Supp. II 1996)) (hereinafter "preserving local zoning authority").

The addition of § 332(c)(7) represented a conscious choice by the House and Senate conferees to maintain limited state and local control over the placement of wireless facilities. *See Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 406-07 (3d Cir. 1999); *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999). The House, concerned that "siting and zoning decisions by non-federal units of government[ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network," would have required the FCC to regulate directly the placement of wireless facilities. H.R. Rep. No. 104-204(I), at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. The conferees, however, created § 332(c)(7) in an effort to "prevent[ ] Commission preemption of local and State land use decisions and preserve[ ] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the 7175 conference agreement." H.R. Conf. Rep. No. 104-458, at 207-08 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

C. The County's Enactment of the Wireless Telecommunications Facilities Ordinance

Against the backdrop of the TCA, the County, in April 2003, enacted Ordinance Number 9549, "An Ordinance Amending the San Diego Zoning Ordinance Relating to Wireless Telecommunications Facilities." The WTO supplements the County's general zoning ordinance (hereinafter "Zoning Ordinance") and creates a four-tier system for the granting of wireless facility permits. According to the WTO a provider, such as Sprint, must obtain one of four conditional use permits

before constructing a wireless facility: (1) Administrative Site Plan Permit; (2) Site Plan with Community Review Permit; (3) Minor Use Permit; or (4) Major Use Permit. WTO § 6985. Each class of permit defines the wireless facility projects that fall within its scope, based on factors including the placement, visibility, and height of the proposed structure. *Id.*

We briefly summarize the permit application requirements of the WTO. A permit applicant must: (1) identify the geographic area served by the site, list all of the applicant's other sites in the area, and describe why the site is necessary to the applicant's network; (2) submit a "visual impact analysis" that describes the "maximum silhouette, viewshed analysis, color and finish palette and proposed screening," and includes simulated photographs of the site; and (3) create a narrative detailing the site's height, maintenance, noise emissions, alternative placement in a preferred site (if the site does not fall within one of the geographic areas preferred by the County for wireless facilities), landscaping plan, fire service plan, hazardous materials use, maintenance personnel parking plan (if the site is located in a public right of way), "a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities whenever technically and economically feasible and aesthetically desirable," and the "lease area of the proposed facility on the plot plan." *See* WTO §§ 6984, 6986(B). The WTO also discusses the general and design regulations applicable to wireless facilities, so that an applicant may design a compliant facility. *See* WTO §§ 6985(C), 6987.

In addition to the provisions of the WTO, wireless providers that apply for use permits are subject to other requirements contained in the Zoning Ordinance. The Zoning Ordinance requires applicants to submit: (1) a

list of "all persons having a interest in the application as well as the names of all persons having any ownership interest in the property involved;" (2) complete plans for the site; and (3) an "appropriate environmental impact review document." *See* Zoning Ordinance § 7345(b).

Following submission of an application, the review process, established by the Zoning Ordinance and the provisions added by the WTO, reserves to the County's permitting authority significant discretion. Before a use permit is granted, the authority must find that "the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residences, or structures." Zoning Ordinance § 7358(a). The Zoning Ordinance lists items of "consideration," but leaves the authority to consider "any other relevant impact of the proposed use." *Id.* § 7358(a)(6). Additionally, the WTO requires that the decision maker must determine that the proposed facility is appropriately "camouflaged," "consistent with community character," and designed to have minimum "visual impact." *See* WTO §§ 6985, 6987. Finally, the Zoning Ordinance, *inter alia*, allows the County's permitting authority to impose conditions on the use consistent with the objectives of the Zoning Ordinance, *id.* § 7362; to permit seemingly open-ended public hearings, *id.* § 7356 (hearing before grant or denial of use permit), § 7366(h) (hearing on appeal from grant or denial of use permit); and to order revocation or modification of a use permit following a violation, *id.* § 7382(a)(2). The ordinance also observes that it is a misdemeanor or infraction to violate a use permit's conditions. *Id.* § 7703.

II.

Sprint and its co-plaintiff in the district court, Pacific Bell Wireless, LLC, dba Cingular Wireless, brought a

prima facie challenge to the WTO, arguing that it was preempted by § 253(a) (removing barriers).[2] Sprint suggested that the "onerous" permitting structure of the WTO, and the discretion retained by the County, prevented it from providing wireless service. Sprint also argued that the four-tier permitting system imposed by the WTO added an additional tier that was not generally applicable to all telecommunications providers, and thus the ordinance discriminated against wireless telecommunications providers in violation of § 253(c) (addressing state and local authority to manage the public rights-of-way) and the Fourteenth Amendment to the Constitution. In addition to a permanent injunction against the enforcement of the WTO, Sprint sought § 1983 money damages and attorney's fees. The County, however, argued that § 253(a) was inapplicable to zoning ordinances which regulate wireless providers. Rather, the County suggested that § 332(c)(7) (preserving local zoning authority) governed the ability of local governments to regulate wireless facility placement and construction, and that Congress provided in § 332(c)(7) the exclusive mechanism to challenge zoning decisions.

The district court first addressed the applicability of § 253(a) when it considered the County's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss. The court held that the plain language of § 253(a) permitted a facial challenge to a local ordinance, while § 332(c)(7) governed challenges to individual facility placement decisions. Nevertheless, Sprint's § 253(c) and Fourteenth

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[2] The district court dismissed with prejudice the claims of Pacific Bell Wireless on February 8, 2005, pursuant to a stipulation of dismissal filed by the parties.

Amendment equal protection claims failed, according to the court, because § 253(c) is a safe-harbor provision that does not give rise to a separate cause of action. Sprint also failed to meet its burden of refuting the rational basis for the WTO's allegedly discriminatory classification, which the court reasoned was its obligation in order to bring a Fourteenth Amendment claim. Finally, the court permitted Sprint's § 1983 claim to proceed because the County only challenged in its Rule 12(b)(6) motion the applicability of § 253(a).

The County next filed a Federal Rule of Civil Procedure 12(c) motion for judgment on the pleadings. It argued that § 253(a) did not create a private right of action, and thus Sprint could not employ the statute to seek an injunction or § 1983 damages and fees. The County also argued that the members of its Board of Supervisors, named by Sprint as defendants in their individual capacities, were absolutely immune from damages under § 1983. The district court, applying the factors described in *Cort v. Ash*, 422 U.S. 66, 78 (1975), determined that Congress "impliedly created a private right of action under § 253(a)." The court next recognized the presumption in favor of enforcing federal rights under § 1983 and determined that the TCA did not foreclose the remedy. Finally, the court agreed that the County of San Diego Supervisors were immune from damages in their capacity as legislators and dismissed them from the suit.

Sprint and the County filed motions for summary judgment. Sprint argued that, as a matter of law, the WTO violated § 253(a) and therefore the court should enjoin enforcement of the ordinance and award damages and fees under § 1983. The County, *inter alia*, reasserted its argument that § 332(c)(7) was the provision of the TCA applicable to the placement of wireless tele-

communications facilities and thus Sprint could not bring a claim under § 253(a). The court granted Sprint's request for a permanent injunction, but vacated its earlier ruling that § 253(a) could support a claim for § 1983 damages.[3]

III.

In general we review a summary judgment order granting a permanent injunction for abuse of discretion. *Washington State Republican Party v. Wash.*, 460 F.3d 1108, 1115 (9th Cir. 2006). "However, 'any determination underlying the grant of an injunction [is reviewed] by the standard that applies to that determination.' " *Id.* (quoting *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003)). Thus, we review the district court's findings of fact for clear error and its determinations of law-including the determination that a local statute is preempted by federal law-*de novo*. *See Ting*, 319 F.3d at 1135; *see also Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877 & n. 12 (9th Cir. 2006); *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (hereinafter "*Berkeley*") (reviewing *de novo* district court's decision that § 253 preempted local right-of-way use ordinance).

IV.

This appeal presents three related questions of law. The threshold question is whether Sprint may seek a

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[3] This case was originally assigned to the District Judge Judith Keep, who ruled on the County's motions to dismiss the case and for judgment on the pleadings. Following Judge Keep's death on September 14, 2004, the case was reassigned to District Judge Barry Ted Moskowitz, who ruled on the parties' motions for summary judgment.

permanent injunction against the enforcement of the WTO under § 253(a) (removing barriers). The second question is whether the WTO violates § 253(a) as a matter of law. *See, e.g., United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003) ("[A] facial challenge to the constitutionality of a statute is a question of law"), *see also United States v. Salerno*, 481 U.S. 739 (1987). The final question is whether Sprint may recover money damages and fees arising from a violation of § 253(a) under § 1983.

A. The Availability of Injunctive Relief

The County first challenges the applicability of § 253(a) (removing barriers) to local zoning ordinances, a matter of first impression in this circuit. We must determine whether, as a matter of law, § 253(a) may preempt a wireless facilities zoning ordinance. The County concedes that § 253(a), which covers all common carriers, is generally applicable to wireless providers, but argues that § 332(c)(7) (preserving local zoning authority) should govern challenges regarding the placement and construction of wireless facilities.

1. Sprint's Ability to Seek Injunctive Relief

As a threshold matter, we must consider whether Sprint has standing to challenge the WTO under § 253(a). The County, in filings before the district court, conceded the availability of injunctive relief under the Supremacy Clause if the WTO was within the preemptive scope of § 253(a). *See* U.S. Const. art. VI, § 2. We nevertheless pause to consider the district court's jurisdiction. *See Juidice v. Vail*, 430 U.S. 327, 331 (1977) (court must consider standing of party under Article III despite failure of parties to raise the issue).

We acknowledged in *City of Auburn v. Qwest Corporation* that the Supremacy Clause permits the TCA to

preempt state and local statutes and regulations, though the court did not squarely address Qwest's standing. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001) (hereinafter "*Auburn*") (observing that Supremacy Clause permits § 253(a) to expressly preempt local laws). *See also Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (discussing preemption under the Supremacy Clause); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006) (declining to reach whether § 253(a) creates a private right because injunctive relief sought under Supremacy Clause); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1264 (10th Cir. 2004) (hereinafter "*Santa Fe*") (applying *Shaw* to find Qwest's § 253(a) preemption claim federally justiciable under the Supremacy Clause); *N.J. Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241-42 (3d Cir. 2002) (basing § 253 preemption on Supremacy Clause).

The Sixth Circuit has expressed concern that standing under the Supremacy Clause is inappropriate, absent a private statutory right of action. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.1 (6th Cir. 2000). The *TCG Detroit* court declined to approve a case in the District Court for the Western District of Texas that, like *Auburn* and the district court in this case, proceeded under the Supremacy Clause despite finding a lack of a private right under the TCA. *See AT&T Communications v. City of Austin*, 975 F. Supp. 928, 936 (W.D. Tex.

1997), *vacated as moot by,* 235 F.3d 241 (5th Cir. 2000). The Sixth Circuit did not disclose the precise source of its discomfort, but a footnote raised the concern that § 253(d) might vest in the FCC exclusive or primary jurisdiction to preempt state and local regulations. Nevertheless, we will not disturb our approach in *Auburn* because we conclude that the availability of injunctive relief is appropriate under *Shaw. See Santa Fe,* 380 F.3d at 1264.

2. The Applicability of § 253(a) to Zoning Ordinances Regulating Wireless Telecommunications Facilities

The District Court twice held that § 253(a) may be employed to assert a facial challenge to a wireless facilities zoning ordinance. Both times the court reasoned that, on the face of the TCA, § 253(a) addresses "State or local statute[s] or regulation[s]" and § 332(c)(7) "decisions regarding the placement, construction, and modification" of facilities. Thus, while § 332(c)(7) may be used to challenge individual zoning decisions, the court held that § 253(a) is a proper vehicle to challenge an entire wireless facilities zoning ordinance.

a. The Distinction Between § 253(a) and § 332(c)(7)

The distinction between the application of § 253(a) (removing barriers) and § 332(c)(7) (preserving local zoning authority), for purposes of this case, is significant. Both § 253(a) and § 332(c)(7)(B)(i)(II) employ similar language to limit states or localities from prohibiting or effectively prohibiting personal wireless service, the limitation upon which Sprint relies. *Compare* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to

provide any interstate or intrastate telecommunications service.") *with id.* § 332(c)(7)(B)(i) ("The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof .... (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."). Section 332(c)(7), however, further requires:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.

Id. § 332(c)(7)(B)(v).[4] Moreover, the Supreme Court has already held that claims brought under § 332(c)(7) do not support § 1983 damages or fees. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (holding that "[e]nforcement of § 332(c)(7) through § 1983 would

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[4] In addition to establishing a period of limitations for a claim, § 332(c)(7)(B) contains three substantive limitations on state or local decisions regarding the placement of wireless facilities. The decision may not "unreasonably discriminate among providers of functionally equivalent services;" "prohibit or have the effect of prohibiting the provision of wireless services;" or be based on "the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(i)(I), (B)(i)(II) & (B)(iv). The section also contains three procedural limitations. The decision regarding placement must be in writing, supported by substantial evidence, and reached "within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii) & (iii). *See U.S. Cellular Tel. of Greater Tulsa L.L.C. v. City of Broken Arrow*, 340 F.3d 1122, 1132-33 (10th Cir. 2003).

distort the scheme of expedited judicial review and limited remedies created by § 332(c)(7)(B)(v)"). Thus, it could be argued that the period of limitations and certain unavailability of § 1983 damages make § 332(c)(7) a comparatively unattractive vehicle to pursue a facial challenge to a wireless facilities zoning ordinance.

b. The Novel Application of § 253(a)

The use of § 253(a) (removing barriers) to preempt an entire wireless facilities zoning ordinance is a new and different application of the TCA. Courts have frequently inquired whether an individual zoning decision is contrary to § 332(c)(7)(B) (preserving local zoning authority). *See, e.g., Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529, 535 (2d Cir. 2005) (applying § 332(c)(7)(B)(i)(II) to determine whether planning board must grant application to construct wireless tower); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 730-31 (9th Cir. 2005) ("*MetroPCS*") (applying § 332(c)(7)(B)(i)(II) to determine whether denial of conditional use permit imposed a "general ban" on new wireless service providers); *USCOC of Virginia RSA # 3 v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 267-68 (4th Cir. 2003) (applying § 332(c)(7)(B)(i)(II) to determine whether denial of application to construct wireless telecommunication tower had the effect of prohibiting service); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 833 (7th Cir. 2003) (applying § 332(c)(7)(B)(i)(II) to challenge regarding individual zoning decision). *Cf. Abrams*, 544 U.S. at 120-21 (assuming, *arguendo*, that § 332 creates individually enforceable rights but holding § 1983 damages not available). But, facial challenges to wireless facilities zoning ordinances are rare. *But cf. Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 693 (3d Cir. 2002)

(finding facial challenge to wireless facilities zoning ordinance brought under § 332(c)(7)(B)(i) moot because of intervening change in ordinance).

The lack of cases challenging zoning ordinances is unsurprising because of the high burden faced by a party asserting a facial challenge. *See Salerno,* 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Indeed, we have observed that it may be particularly difficult to mount a facial challenge against a zoning ordinance:

> Zoning rules—such as those that allow local authorities to reject an application based on "necessity"—may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision—which it supports with substantial evidence—can a court determine whether the TCA has been violated.

MetroPCS, 400 F.3d at 724.

c. Statutory Interpretation of the TCA

To decide whether § 253(a) (removing barriers) may be used to invalidate a local wireless facilities zoning ordinance we first examine the plain language of the statute. *See United States v. Ron Pair Enters.,* 489 U.S. 235, 241 (1989); *Clark v. Capital Credit & Collection Servs., Inc.,* 460 F.3d 1162, 1168-69 (9th Cir. 2006). Courts are not, however, "bound by the plain meaning of a statute where its literal application will produce a re-

sult demonstrably at odds with the intention of its drafters." *Clark*, 460 F.3d at 1169 (quotation marks and citation omitted). Legislative history may inform the interpretation of a statute's plain language "when there is clearly expressed legislative intention contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987) (quotation marks and citation omitted). When a statute's meaning is plain, a court may nevertheless avoid "a result contrary to the statute's purpose or lead to unreasonable results." *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004); *see also United States v. Bahe*, 201 F.3d 1124, 1133-34 (9th Cir. 2000) (examining legislative history).

Here, the County argues that § 332(c)(7) (preserving local zoning authority) specifically maintains local authority to decide where and how wireless facilities are constructed and contains a procedure for challenging those decisions. Congress, therefore, must have intended, according to the County, any challenge to a wireless facilities zoning ordinance to proceed under that section rather than the more expansive § 253(a), which is not limited to issues regarding wireless facility placement. Any other reading would render the reservation of local authority described in § 332(c)(7) moot. The County also relies on the House and Senate conferees understanding of § 332(c)(7), reported in the House Conference Report accompanying the TCA:

> The conference agreement creates a new section 704 [U.S. Code § 332(c)(7)] which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over

> zoning and land use matters except in the limited circumstances set forth in the conference agreement.

H.R. Conf. Rep. No. 104-458, at 207-08 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

i. Plain Meaning of the TCA

The County's insistence that any challenge to a local zoning ordinance be lodged under § 332(c)(7)(B)(i)(II) ignores the plain meaning and structure of the TCA. Section 253(a) (removing barriers) is located in Chapter 5, "Wire or Radio Communications," of United States Code Title 47. We have recognized the "preemptive language [of § 253(a)] to be clear and 'virtually absolute' in restricting municipalities to a 'very limited and proscribed role in the regulation of telecommunications.' " *Berkeley*, 433 F.3d at 1256 (citation omitted). Section 253 protects all common carriers, and applies to "commercial mobile service" providers unless FCC rulemaking suspends application of the section. *See* 47 U.S.C. § 332(c)(1)(A). The FCC has not exempted mobile service providers from the protections of § 253; to the contrary, FCC decisions apply § 253 to claims that a state or local statute regulating wireless service providers violates the substantive provisions of the TCA.[5] *See, e.g., In*

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[5] We have not located an FCC decision directly addressing the applicability of § 253 to zoning ordinances—rather than other state and local ordinances such as those regulating franchising-governing wireless providers. The FCC tentatively expressed the opinion that it could invalidate a zoning ordinance under § 253. *See In re Cellular Telecomm. Indus. Ass'n*, 12 F.C.C.R. 11795, 11797 (1997) (request for comment on supplemental pleading cycle). In that administrative proceeding, the CTIA challenged a moratorium on the construction of telecommunications facilities. The FCC invited comment regarding its tentative conclusion that,

re Pittencrieff Communications, Inc., 13 F.C.C.R. 1735 (1997), *aff'd sub nom. Cellular Telecomm. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999). Thus, § 253(a) applies on its face to local ordinances that have the effect of prohibiting wireless service.

Nevertheless, the County contends that applying § 253(a) would frustrate the purpose of § 332(c)(7) (preserving local zoning authority). In *Abrams* the Supreme Court observed that § 332(c)(7) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." 544 U.S. at 115. In that case the Court assumed, *arguendo*, that § 332(c)(7) created "individually enforceable rights," which could be the basis for seeking injunctive relief through the private right of action created by § 332(c)(7)(B)(v). *Id.* at 120, 127. The Court went on to determine that the "expedited judicial review and limited remedies created by § 332(c)(7)(B)(v)" foreclosed enforcement of § 332(c)(7)'s limitations through § 1983. *Id.* at 127.

In the present litigation, however, we are asked to examine the general provisions of § 253(a) rather than

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> Section 332(c)(7)(B)(v) does not, however, limit our authority to review local facility siting moratoria which may constitute entry barriers under Sections 253(d) or entry regulations under 332(c)(3).

Id. at 11796. The CTIA, however, withdrew its petition for review before the FCC issued a final order expressing its opinion on the applicability of § 253. *See In re Cellular Telecomm. Indus. Ass'n*, 14 F.C.C.R. 9174 (1999). In a separate proceeding, the FCC examined whether a local ordinance limiting the placement of payphones on private land violated § 253(a), and determined that it did not. *See In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191 (1997).

the specific limitations of § 332(c)(7). Sprint does not resort to the substantive or procedural limitations that are unique to § 332(c)(7). Rather, the company seeks enforcement of a preemption that is common to both § 253(a) and § 332(c)(7)(B)(i)(II). Thus, we find the distinction that the County draws illusory. Section 253(a) lacks the period of limitations created by § 332(c)(7)(B)(v), but it also lacks the specific limitations that give an individual greater latitude to challenge a zoning decision under § 332(c)(7). The choice to pursue a prima facie challenge under § 253(a) or an individual challenge under § 332(c)(7) is real, but that choice does not imply that one section must undermine the other.

Interpreting § 253(a) to preempt certain local wireless zoning ordinances does not negate the substantive and procedural elements of § 332(c)(7). *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (courts must make "every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous"). Section 332(c)(7) prescribes a "restrictive private remedy" for individuals seeking "[j]udicial review of zoning decisions." *See Abrams*, 544 U.S. at 121, 122. The procedure for judicial review allows individuals to challenge "any final action or failure to act by a State or local government or any instrumentality thereof[.]" 47 U.S.C. § 332(c)(7)(B)(v). A judicial proceeding must be brought within thirty days of the state's or locality's action or failure to act. *Id.*

The County argues that permitting a facial challenge to an entire ordinance under § 253(a) would create a "giant loophole" in § 332(c)(7). But, that argument ignores § 332(c)(7)'s preferential treatment of challenges to individual zoning decisions and the additional limitations and

requirements that § 332(c)(7) places on zoning authorities. A zoning decision might be challenged because it does not comply with the procedural requirements of § 332(c)(7). *See id.* § 332(c)(7)(B)(ii) & (iii) (decision must be in writing, supported by substantial evidence, and reached "within a reasonable period of time."). The decision might also violate the substantive provisions of the section. *See id.* § 332 (c)(7)(B)(i)(I), (II) & (iv) (decision may not unreasonably discriminate among providers, prohibit or have the effect of prohibiting service, or be based on radio emission levels that are acceptable to the FCC). Section 253, by contrast, states only that a statute or regulation may not prohibit or have the effect of prohibiting service. *See id.* § 253(a). The substance of the sections is therefore different and, even though § 253(a) does not place a thirty-day period of limitation on facial challenges, § 332(c)(7)'s period of limitation for challenges to individual zoning decisions would be left intact. *Cf. Abrams*, 544 U.S. at 126 ("[c]onstruing § 332(c)(7) . . . to create rights that may be enforced *only* through the statute's express remedy" (emphasis added)). Ultimately, the difficulty of raising a facial challenge to a zoning regulation, *see MetroPCS*, 400 F.3d at 724, would likely prevent the scenario that the County suggests; wireless providers could not simply avoid § 332(c)(7)'s period of limitation by styling their challenges to individual zoning decisions as facial challenges under § 253(a).[6] Rather, § 332(c)(7) would continue to offer a more expedient, and extensive, basis for review.

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[6] The County also argues that we have established a "more lenient standard" for successful facial challenges under § 253(a) than under § 332(c)(7)(B)(i), relying on a supposed conflict between dicta in *MetroPCS*, 400 F.3d at 724, 725 n.3, 727 (alluding to the difficulty under § 332(c)(7)(B) of bringing facial challenge based on a *single zoning decision*) and *Auburn*, 260 F.3d at 1175 (discussing under

Additionally, other provisions contained in § 253 suggest that Congress did not perceive a contradiction between § 253(a) and § 332(c)(7). Congress expressly recognized the potential of § 253(a) to interfere with other provisions of § 332. Section 253(e) exempts from preemption § 332(c)(3) (addressing limited state regulation of wireless service rates). *See* 47 U.S.C. § 253(e). Congress also excluded from § 253(a)'s preemptive scope state and local regulations requiring "fair and reasonable" compensation for the use of public rights-of-way and requiring telecommunications providers to serve rural areas. *See id.* § 253(c), (f). Had Congress harbored a similar concern that § 253(a) could negate the protections allegedly extended by § 332(c)(7) it could have included a similar exemption, but it did not do so. Because this series of exclusions demonstrates Congress's awareness that § 253 could affect § 332, and because the existing exclusions address traditionally local provinces like the management of rights-of-way, we interpret—*expressio unius est exclusio alterius*—Congress's failure to omit § 332(c)(7) from the reach of § 253(a) as an affirmation of § 253(a)'s applicability to state and local wireless zoning ordinances.[7] *See Clark*, 460 F.3d at 1169;

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§ 253(a) a facial challenge to a franchise *regulation*). Though we conclude here that Sprint's challenge to the WTO meets the criterion described in *Auburn* for challenging an ordinance, we reject the argument that we have lowered the threshold suggested by *MetroPCS* for a successful facial challenge predicated on a zoning decision.

[7] "The expression of one is the exclusion of another." The Supreme Court has recently reminded courts of the limits of this canon of statutory interpretation. It cautioned that the canon "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *See Barnhart v. Peabody Coal*

Austein v. Schwartz (*In re Gerwer*), 898 F.2d 730, 732 (9th Cir. 1990) ("The express enumeration indicates that other exceptions should not be implied.").

ii. Legislative History of the TCA

Because the plain language of § 253(a) (removing barriers) permits facial challenges to zoning ordinances, we need only examine the legislative history of the TCA to confirm that the language is not "demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). We conclude that the legislative history of the TCA does not indicate that Congress intended a result contrary to the plain reading of the statute.

Relying on the House Conference Report accompanying the TCA, we have recognized that, "one of the primary purposes of section 332(c)(7) is to protect the legitimate traditional zoning prerogatives of local governments." *MetroPCS*, 400 F.3d at 727 n.5. The conferees inserted § 332(c)(7) (preserving local zoning authority) to rebuff a House provision that "would have given authority to the FCC to regulate directly the siting of wireless communications towers" and thus completely preempt local zoning decisions. *See St. Croix*, 342 F.3d at 828-29.

Co., 537 U.S. 149, 168 (2003) (citation omitted). Here, although Sprint does not make direct reference to the canon, it argues that we should interpret Congress's failure to exclude § 332(c)(3) from § 253(a)'s preemptive scope as evidence that Congress intended the two sections to be enforced together. Though one exclusion is alone insufficient to apply the canon, *see Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002), the series of exclusions contained in § 253 represents a sufficient basis to determine that Congress considered, but rejected, excluding § 332(c)(7) from the scope of § 253(a).

There is no indication, however, that Congress feared § 253(a)'s preemption language would endanger local zoning ordinances it intended to permit under § 332(c)(7). Indeed, both § 253(a) and § 332(c)(7)(B)(i)(II) proscribe substantively the same local regulations: those that prohibit or have the effect of prohibiting personal wireless service. The Conference Report explains, in the context of § 332(c)(7), that "[i]t is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis." *See* H.R. Conf. Rep. No. 104-458, at 208, 1996 U.S.C.C.A.N. at 222. The similar language of the sections and the Conference Report demonstrates that § 253(a) is consistent with the substantive provision of § 332(c)(7)(B)(i)(II).

For purposes of this appeal, the principal distinction between the two sections is § 332(c)(7)(B)(v)'s thirty-day period of limitations. The Conference Report does not explain the intent of the limitation, though it is generally consistent with the conferee's requirement that the court selected by the individual challenging the zoning decision "act expeditiously in deciding such cases." *See* H.R. Conf. Rep. No. 104-458, at 209, 1996 U.S.C.C.A.N. at 223. We have, however, found no legislative history that suggests Congress intended to limit facial challenges to the thirty-day period following some event, whether the passage of the state or local regulation challenged or a particular zoning decision applying a state or local regulation.

Thus, the legislative history of § 253 and § 332(c)(7) does not undermine our plain reading of the sections. We need not examine the legislative history further.

B. Preemption of the WTO

We next consider whether the WTO is preempted by the TCA. The County argues that the additional requirements imposed by the WTO are consistent with general zoning principles and fall short of the conditions that caused our court to preempt the City of Auburn's franchise ordinance. *See Auburn*, 260 F.3d at 1176. Sprint contends that the WTO is an "onerous" system of requirements that shares many of the restrictions that amounted to an effective prohibition on wireless service in *Auburn*. Sprint also argues that the WTO is not "competitively neutral" because it regulates wireless providers in a manner not applicable to all utility providers and likens the degree of regulation to that "usually reserved for landfills, cemeteries and power plants," not utilities.

The district court gleaned a set of concerns from cases discussing preemption of local ordinances under § 253(a). *See Auburn*, 260 F.3d at 1176 (invalidating local franchising ordinance); *Santa Fe*, 380 F.3d 1258 (preempting right-of-way ordinance that, *inter alia*, increased rent, imposed costly new equipment requirement, and permitted unfettered discretion); *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1260 (S.D. Cal. 2002) (considering whether regulations requiring conditional use permit to install facilities in public right-of-way violated § 253(a)); *Qwest Comm. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) (considering whether public right-of-way ordinance violated § 253(a)). Informed by those opinions, the district court focused on the WTO's application submission requirements, the discretion reserved to the zoning authority, the public hearing requirements, and the criminal penalties for violation of a use permit.

The court concluded that the combination of these factors had the effect of prohibiting wireless service in a matter similar to the impermissible franchising ordinance in *Auburn*.

In *Auburn* we identified the factors considered by the district court in this case. *See Auburn*, 260 F.3d at 1175-76. Our concerns here are almost identical. The County's WTO, on its face, supplements the Zoning Ordinance by adding submission requirements to an already voluminous list. *See* WTO § 6984. Those requirements are in addition to the open-ended discretion and threat of criminal penalties contained in the Zoning Ordinance. The WTO itself explicitly allows the decision maker to determine whether a facility is appropriately "camouflaged," "consistent with community character," and designed to have minimum "visual impact." *See* WTO §§ 6985, 6987. We find the County's retort—that the elements of the WTO challenged by Sprint are traditional facets of zoning that are unobjectionable for the simple reason that the WTO is a zoning ordinance rather than a franchise or public right-of-way ordinance—unconvincing. Though *Auburn* discussed a franchise ordinance, our concerns in this case are largely the same. We conclude that the WTO imposes a permitting structure and design requirements that presents barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a).

C. Section 1983 damages and fees

Finally, we consider the availability of § 1983 damages and fees. The district court, reversing its earlier holding, determined that § 253(a) (removing barriers) does not create a private right enforceable through § 1983. The court's holding is consistent with the Tenth Circuit's position, *Santa Fe*, 380 F.3d at 1266-67 (§ 253(a)

does not create a private right), but presents a question of first impression in our circuit. *Cf. Bell South Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001) (interpreting § 253 to create an implied private right of action when the challenged regulation concerns the use of public rights-of-way, implicating § 253(c)'s safe-harbor); *TCG Detroit*, 206 F.3d at 624 (same). No other circuit court has reached the issue. The district courts in this circuit have overwhelmingly concluded that § 253(a) neither creates a right enforceable under § 1983, nor implies a separate private right of action.[8] *See Pacific Bell Tel. Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1054 (N.D. Cal. 2006) (finding that § 253(a) creates no private right enforceable under § 1983); *Qwest Communications Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085, 1090-96 (N.D. Cal. 2001) (finding no implied private right of action under § 253(a) or § 253(c)); *Pacific Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1172-75 (C.D. Cal. 2001) (finding

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[8] The question in this case, of whether § 253(a) creates a right enforceable under § 1983, overlaps with but is distinct from the question of whether the statute implies a separate cause of action. As we have earlier explained, "The main difference between an implied cause of action and a right enforceable under Section 1983 turns on the source of the remedy. A plaintiff invoking an implied right of action must demonstrate that Congress intended to create not only a private right but also a private remedy. In contrast, once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983, and the plaintiff need not show any further congressional intent to create a remedy." *Price v. City of Stockton*, 390 F.3d 1105, 1109 n.3 (9th Cir. 2004) (citations and quotation marks omitted). The test in *Cort v. Ash*, 422 U.S. 66 (1975), discussed by the district court, is used to determine whether a statute implies a private right of action, but not for determining whether a statute creates a right enforceable under § 1983.

§ 253(c) creates an implied private right of action but that § 253(a) and (b) do not).

Section 1983 "by itself does not protect anyone against anything," *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979), and thus the question for us is whether § 253(a) independently confers a right on Sprint. Our inquiry differs from the question of whether Sprint may seek enforcement of § 253(a) by bringing its preemption action under the Supremacy Clause of the Constitution. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-08 (1989) ("Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Id.* at 107-08). Here, three requirements guide our inquiry into whether Congress created a right enforceable under § 1983: "1) that Congress intended the statutory provision to benefit the plaintiff; 2) that the asserted right is not so 'vague and amorphous' that its enforcement would strain judicial competence; and 3) that the provision couch the asserted right in mandatory rather than precatory terms." *Watson v. Weeks*, 436 F.3d 1152, 1158 (9th Cir. 2006) (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)) (citations omitted). With regard to the first requirement, we have recognized that "congressional intent to benefit the plaintiff must be shown by statutory language phrased in terms of the persons to be benefited. Anything short of an unambiguously conferred right will not support a 1983 action." *Id.* at 1159 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 284 (2002)) (citations and quotation marks omitted).

Neither § 253(a), nor, for that matter, any other subpart of § 253, mentions the beneficiaries of the section. Section 253 is phrased only in terms of the parties *restricted*—in this case, states and local entities. Indeed, to the extent that any language of the TCA discusses any beneficiaries, it points to "American telecommunications consumers" rather than telecommunications providers. *See* 110 Stat. at 56 (stating that the Act's purpose is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"). In other words, § 253(a) does not designate companies like the plaintiffs in this case as the "identifiable class" required for an enforceable § 1983 right. *See Gonzaga Univ.*, 536 U.S. at 284 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). We thus agree with the Tenth Circuit that § 253(a) does not create a right enforceable under § 1983.

To the extent that Sprint also argues Congress created an implied private right of action, we rejected that argument as well. The Court has described four factors that explore whether a statute implies a private right of action, *see Cort*, 422 U.S. at 85, but among those factors Congressional intent is paramount. *See Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 94 (1981); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988); *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004) (recognizing the Court's subsequent interpretation of the *Cort* factors). The legislative history of § 253, however, does not support the conclusion that an implied private right of action exists. Senators, in the course of debating the TCA, expressed concern that local governments would bear a heavy burden in defending their ordinances before the FCC in Washington, D.C., and thus

inserted § 253(c)'s public rights-of-way provision. *See Santa Fe*, 380 F.3d at 1266-67 (discussing the legislative history of the TCA). It would be inconsistent with this concern to find that Congress intended to expose municipalities to liability through an implied private right of action. We need not examine the remaining *Cort* factors. *Currier*, 379 F.3d at 725-26 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349, 1354 (9th Cir. 1987) ("Even if the first factor were satisfied, we find that plaintiffs have failed to clear the second and third *Cort v. Ash* hurdles[.]")).

V.

When Congress passed the TCA in 1996 it expressed its intent to remove barriers inhibiting the development of telecommunications service. Though the act did not "federalize telecommunications land use law," *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001), it established meaningful limits beyond which state and local governments may not inhibit telecommunications by preventing the construction of wireless communications facilities. Accordingly, we determine that local zoning ordinances regulating the construction and placement of wireless communications facilities are within the preemptive scope of § 253(a) (removing barriers). Moreover, the County's WTO is outside the scope of permissible land use regulations because it has the effect of prohibiting wireless communication services. We thus affirm the decision of the district court that § 253(a) preempts the WTO as a matter of law. Finally, we conclude that § 253(a) does not create a private right of action enforceable under § 1983 and affirm the district court's denial of relief under the section.

Our decision today does not reach the permissibility of the County's general zoning ordinance, which was not litigated in this case. We **AFFIRM** the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Case No. 03-CV-1398

SPRINT TELEPHONY PCS, L.P., A DELAWARE LIMITED PARTNERSHIP, AND PACIFIC BELL WIRELESS, LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA CINGULAR WIRELESS, PLAINTIFFS.

v.

COUNTY OF SAN DIEGO, A DIVISION OF THE STATE OF CALIFORNIA; GREG COX, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; DIANNE JACOB, IN HER CAPACITY AS SUPERVISOR OF THE COUNTY OF SAN DIEGO; PAM SLATER, IN HER CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; RON ROBERTS, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO; AND BILL HORN, IN HIS CAPACITY AS A SUPERVISOR OF THE COUNTY OF SAN DIEGO, DEFENDANTS.

July 8, 2005

MOSKOWITZ, District Judge.

ORDER

On December 1, 2004, Sprint Telephony PCS, L.P. ("Sprint") filed a motion for partial summary judgment.

On December 17, 2004, defendants County of San Diego, Greg Cox, Dianne Jacob, Pam Slater, Ron Roberts and Bill Horn (collectively "County") filed a motion for summary judgment, or, in the alternative, partial summary judgment. For the reasons discussed below, Sprint's motion is **GRANTED IN PART AND DENIED IN PART** and the County's motion is **GRANTED IN PART AND DENIED IN PART**.

I. Procedural Background

Sprint and Pacific Bell Wireless, LLC, dba Cingular Wireless ("Pacific Bell") (collectively "Plaintiffs") commenced this action on July 15, 2003. In their Complaint, Plaintiffs allege that the County's Ordinance No. 9549 N.S. ("WTO" or the "Ordinance"), which amended the San Diego County Zoning Ordinance ("Zoning Ordinance") relating to wireless telecommunications facilities, violates the Federal Telecommunications Act of 1996 (the "TCA"), Pub. L. 104-104, 110 Stat. 56 (1996). The Complaint asserts four causes of action: (1) prohibition of provision of telecommunications service in violation of 47 U.S.C. § 253(a); (2) discriminatory regulation of a public right-of-way in violation of 47 U.S.C. § 253(c) and the Fourteenth Amendment; (3) violation of 42 U.S.C. § 1983; and (4) declaratory judgment.

In an order filed on October 20, 2003, Judge Keep granted in part and denied in part the County's motion to dismiss. Judge Keep granted the motion as to Plaintiffs' second cause of action on the ground that section 253(c) does not provide for a private right of action. Judge Keep also dismissed Plaintiffs' equal protection claim without prejudice. However, the County's motion was denied as to all of the remaining claims. With respect to Plaintiffs' first cause of action, Judge Keep rejected the County's argument that section 253 was inap-

plicable and that section 332(c)(7) was the only avenue for challenging the Ordinance under the TCA.

On November 13, 2003, the County filed a motion for judgment on the pleadings, arguing that Plaintiffs' first cause of action should be dismissed because there is no private right of action under section 253(a). The County also argued that Plaintiff's third cause of action should be dismissed because there is no section 1983 right of action for violations of section 253(a). In an order filed on January 5, 2004, Judge Keep held that Plaintiffs had a private right of action under section 253(a) and could seek section 1983 remedies for violations of section 253(a). *See Sprint Telephony PCS. L.P. v. County of San Diego*, 311 F. Supp. 2d 898 (S.D. Cal. 2004).

On September 16, 2004, this case was reassigned to Judge Moskowitz.

On February 8, 2005, Pacific Bell was dismissed from the case with prejudice pursuant to a stipulation and order thereon.

II. Factual Background

A. *The WTO*

The WTO was enacted by the County in April, 2003. The WTO states that its purpose is "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego."

The WTO establishes a four-tier application processing structure. (Zon. Ord. § 6985.) Tier 1 applies to invisible wireless facilities and facilities with very low visual impacts. Tier 2 applies to low visibility facilities in the commercial, industrial or special purpose zones, or facilities in any of the zones that are covered by a "Wireless

Community Master Plan," as defined by section 6983(W). Tier 4 applies to non-camouflaged towers greater than 60 feet, or 15 feet above the maximum height limit in the zone, whichever is lower, and all facilities in residential and rural zones except those that fall within Tiers 1 and 2. Tier 3 applies to all facilities other than those meeting the criteria of Tiers 1, 2, or 4.

Applications under Tier 1 are processed as administrative site plans, which are reviewed by the Director of the Department of Planning and Land Use ("Director"). Applications under Tier 2 are processed similarly to Tier 1 applications except that they are also subject to community review. Applications under Tiers 3 and 4 are processed as minor use permits and major use permits, respectively. Whether wireless applications are processed under Tier 3 or 4, they must comply with the use permit requirements in §§ 7350-7399 of the County Zoning Ordinance.

The WTO requires all applicants to submit detailed information regarding the proposed wireless facility. Among other things, applicants are required to provide:

• a map showing all the applicant's existing sites in the local service network associated with the gap the facility is meant to close (Zon. Ord. § 6984(A))

• a visual impact analysis (including photo simulations) showing the maximum silhouette, viewshed analysis, color and finish palette and proposed screening (Zon. Ord. § 6984(B))

• evidence that establishes that the proposed facilities have been designed to the minimum height required from a technological standpoint for the proposed site (Zon. Ord. § 6985(C))

• the anticipated maintenance and monitoring program for the antennas, back-up equipment and landscaping (*Id.*)

• Noise and acoustical information (*Id.*)

• a plan showing all proposed landscaping, screening and proposed irrigation (*Id.*)

• a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities (*Id.*)

Furthermore, the Director may "require additional information based upon specific project factors." (Zon. Ord. § 6984.)

The WTO also imposes general regulations and design regulations. (Zon. Ord. §§ 6985(C), 6987.) A number of these regulations pertain to requirements that the facilities be "camouflaged", "consistent with community character," "compatible with existing architectural elements, building materials and other site characteristics," and have minimal "visual impact." (Zon. Ord. §§ 6985(C)(1), (3), 6987(B), (F), (O).)

In addition, the WTO includes the following set-back requirement: "Telecommunications towers located adjacent to a residential use shall be set back from the nearest residential lot line by a distance at least equal to its total height or 50 feet, whichever is greater." (Zon. Ord. § 6985(C)(4).)

B. *The Use Permit Requirements*

The use permit procedures require that applicants submit documents including: a list of the names of all persons having an interest in the application (as well as the names of all persons having any ownership interest in the property involved); complete plans (including a

plot plan); and a description of the property involved and the proposed use permit. (Zon. Ord. § 7354(b)(1)-(2).)

All applications for a use permit are subject to a public hearing requirement. (Zon. Ord. § 7356.) In determining whether to grant a use permit, the Planning Commission (or the Director, in the case of a minor permit) is required to make the following findings:

That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:

1. Harmony in scale, bulk, coverage and density;

2. The availability of public facilities, services and utilities;

3. The harmful effect, if any, upon desirable neighborhood character;

4. The generation of traffic and the capacity and physical character of surrounding streets;

5. The suitability of the site for the type and intensity of use or development which is proposed; and to

6. Any other relevant impact of the proposed use . . . .

(Zon. Ord. § 7358(a).)

Use permits may be granted or modified "subject to the performance of such conditions . . . and for such period of time as the Planning Commission, the Board of Supervisors . . . or the Director . . . shall deem to be reasonable and necessary or advisable under the circumstances so that the objectives of the Zoning Ordinance shall be achieved." (Zon. Ord. § 7362.) A use permit may be revoked or modified if one or more of the conditions

upon which such permit was granted have been violated. (Zon. Ord. § 7382(a)(2).) Any person violating any condition of a use permit shall be deemed guilty of a misdemeanor unless, in the discretion of the prosecutor, it is charged as an infraction. (Zon. Ord. § 7703.)

A major use permit decision may be appealed to the Board of Supervisors. (Zon. Ord. § 7366(a)(1).) A minor use permit decision may be appealed to the Planning Commission. (Zon. Ord. § 7366(a)(2).) Following the filing of an appeal, a public hearing shall be scheduled and noticed and all interested persons may appear and present evidence. (Zon. Ord. § 7366(h).) The authority having appellate jurisdiction may grant or modify the use permit subject to "specified conditions it imposes pursuant to Section 7362" or may revoke or deny the use permit "as is appropriate." (Zon. Ord. § 7366(i).)

III. Discussion

Sprint seeks partial summary judgment on its section 253(a) claim and section 1983 claim (liability only). The County seeks summary judgment on these same claims.

The County's primary argument is that Sprint cannot challenge the WTO under 47 U.S.C. § 253(a) and is limited to the remedies provided by 47 U.S.C. § 332(c)(7). As discussed below, the Court finds that (1) section 253(a) is applicable; (2) the WTO, as presently drafted, violates section 253(a); and (3) the WTO does not fall within the safe harbor of section 253(c).

The Court also finds that Sprint is not entitled to damages under section 1983 because section 253(a) does not give rise to a private right of action. Nevertheless, Sprint's preemption claim is still viable under the Supremacy Clause.

Accordingly, the Court grants summary judgment in favor of Sprint, and against the County, on Sprint's first cause of action for violation of section 253(a) and fourth cause of action for declaratory relief. The Court grants summary judgment in favor of the County, and against Sprint, on Sprint's third cause of action for violation of 42 U.S.C. § 1983.

A. *Applicability of Section 253(a)*

The County has resurrected its argument that Sprint's section 253(a) and section 1983 claims fail because section 253(a) is inapplicable. The County reasserts that if Sprint wishes to mount a TCA challenge against the WTO, it must proceed under section 332(c)(7). Once again, the Court rejects this argument.

In denying the County's motion to dismiss Sprint's section 253(a) and section 1983 claims, Judge Keep held that section 253(a) applies to facial challenges of ordinances whereas section 332(c)(7) applies to individual siting *decisions* made under an ordinance. Sprint argues that Judge Keep's ruling is "law of the case" that precludes the Court from reexamining the issue. Sprint is incorrect. The doctrine of "law of the case" does not "impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001). *See also United States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004).

However, for the most part, the Court agrees with Judge Keep's ruling, which is consistent with the language of section 253(a) and section 332(c)(7).[1] Section

[1] The Court notes that the County did not bring a motion for reconsideration before Judge Keep.

253(a) provides: "No state or local *statute* or *regulation* . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." (Emphasis added.) In contrast, section 332(c)(7)(A) provides:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over *decisions* regarding the placement, construction, and modification of personal wireless service facilities.

(Emphasis added.)

The County argues that section 332(c)(7) also includes language indicating that section 332 extends to regulations. Specifically, 47 U.S.C. § 332(c)(7)(B) provides, in relevant part:

> (B) Limitations
>
> (i) The *regulation* of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> * * * * * *
>
> (iv) No State or local government or instrumentality thereof may *regulate* the placement, construction, and modification of per-

> sonal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(Emphasis added.)

Viewing this language in context, however, it is clear that section 332's primary focus is on individual decisions. The provisions of section 332(c)(7)(B) are *limitations* on the general authority set forth in section 332(c)(7)(A), which concerns *decisions* regarding the placement, construction, and modification of personal wireless service facilities. Although the term "decisions" could be broadly construed as including regulations, other provisions in section 332(c)(7) indicate that "decisions" refers to decisions on individual applications to place, construct, or modify personal wireless service facilities.

Subsection (c)(7)(B)(ii) provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed . . . . " Subsection (c)(7)(B)(iii) provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

Subsection (c)(7)(B)(v), the remedy provision, states that "any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this sub-

paragraph may, within 30 days *after such action or failure to act,* commence an action in any court of competent jurisdiction." (Emphasis added.) Reading this provision in conjunction with subsections (c)(7)(B)(ii) and (c)(7)(B)(iii), the phrase "action or failure to act" refers to a decision or failure to make a decision on a request to place, construct, or modify personal wireless service facilities.

The short limitations period set forth in subsection (c)(7)(B)(v) supports the conclusion that section 332 concerns challenges to decisions on individual applications or requests. If the 30-day limitations period governed facial challenges to ordinances, such challenges would have to brought within 30 days of the implementation of the ordinances at issue. Any party who failed to bring suit within the 30 days, even if the party lacked standing at that time, would be barred from raising a facial challenge.[2] Congress could not have intended such a result.

It is possible that a court reviewing an individual decision under section 332 could also properly reach the issue of whether the regulation or ordinance underlying the decision is valid. *See, e.g., APT Pittsburgh, Ltd. v. Penn Township Butler County,* 196 F.3d 469 (3rd Cir. 1999). However, nothing in section 332 precludes facial challenges of wireless regulations under section 253(a).

Sprint properly brought its challenge to the WTO under section 253(a). Accordingly, the Court proceeds to the merits of Sprint's 253(a) claim.

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[2] In contrast, a six-year statute of limitations applies to an APA challenge to a regulation. *See, e.g., Sierra Club v. Penfold,* 857 F.2d 1307, 1315 (9th Cir. 1988).

B. *Section 253(a) Preemption*

Section 253(a) is an express preemption clause which bars all state and local regulations that "prohibit or have the effect of prohibiting" the ability of any entity to provide interstate or intrastate telecommunications service. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001). The question before the Court is whether the regulatory scheme established by the WTO prohibits or has the effect of prohibiting Sprint from providing wireless telecommunications service.[3]

In determining whether section 253(a) preempts an ordinance, courts must analyze whether the ordinance's requirements "in combination" have the effect of prohibiting the provision of telecommunications services. *Auburn*, 260 F.3d at 1175-76. *See also Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240-42 (9th Cir. 2004). Section 253(a) does not only preempt regulations that actually prohibit the provision of telecommunications services, but also preempts those that "may ... have the effect of prohibiting" the provision of such services. *Auburn*, 260 F.3d at 1175; *Portland*, 385 F.3d at 1241.

Courts applying section 253(a) have found that certain features of regulations, in combination, have the ef-

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[3] The County argues that the Complaint does not set forth a preemption claim. The County points out that although Sprint's second cause of action alleges a violation of section 253(a), it does not mention "preemption." However, the caption page lists "preemption" as one of the causes of action, the body of the Complaint explains that "the preemption under Section 253 is 'virtually absolute' " (Complaint, ¶ 24), and Sprint seeks injunctive relief. Given that Sprint is seeking damages in connection with its section 1983 claim, there can be no question that Sprint's section 253(a) claim is a preemption claim.

fect of prohibiting the provision of telecommunications services. These features include, but are not limited to, numerous submission or disclosure requirements, retention of discretion by the city to require further disclosures, public hearing requirements, unlimited discretion of the city to grant or deny permits, and civil and/or criminal penalties. *See, e.g., Auburn*, 260 F.3d at 1175-77; *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

In *Auburn*, Qwest, a major telecommunications provider, argued that section 253(a) preempted the ordinances of certain Washington municipalities. These ordinances required telecommunications providers to obtain a franchise to install facilities in public rights-of-way. To obtain a franchise, providers were required to submit a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items, and "[s]uch other and further information as may be requested by the City." *Auburn*, 260 F.3d at 1176. Two of the cities required a public hearing before granting or revoking a franchise. *Id.* Each of the franchise systems authorized the cities to consider "discretionary factors that have nothing to do with the management or use of the right-of-way." *Id.* The "ultimate cudgel" was that each city reserved "discretion to grant, deny, or revoke the franchises and the Cities [could] revoke the franchise if the terms in the ordinance [we]re not followed, even allowing the Cities to remove the company's facilities." *Id.* The ordinances also authorized civil and criminal penalties. *Id.*

The *Auburn* court found that "[t]aken together, these requirements have the effect of prohibiting Qwest and other companies from providing telecommunications services and create a substantial barrier to entry into and participation in the . . . Cities' telecommunications markets." *Id.* (citations omitted). The court explained that its conclusion was "based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone." *Id.* at 1176 n.11.

In *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001), the issue before the court was whether Qwest was entitled to a preliminary injunction on its claim that section 253(a) preempted Berkeley's ordinance governing telecommunications carriers seeking to install facilities in public rights-of-way. Under the ordinance, all carriers were required to obtain a Special Telecommunications Permit. *Id.* at 1088. The preliminary process required: registration and applicable fees; licensing for carriers not exempted from franchising requirements; significant disclosure requirements along with discretion to require further disclosure; and compliance with other federal, state, and local laws such as excavation and encroachment permits. *Id.* at 1097-98. Thereafter, the ordinance imposed requirements concerning "the installation, maintenance, operation, removal and upgrade of any equipment or facilities installed, including record-keeping, reporting, insurance, indemnity, and financial requirements." *Id.* at 1097. After notifying the affected public and holding a public hearing, Berkeley would make a decision on the application based on various enumerated factors. *Id.* at 1098. When the carrier was not exempted from licensing and franchise requirements, Berkeley also considered the type of service provided, the effect on public health,

safety and welfare, and "such other [unnamed] factors-as may demonstrate that the grant to use the public rights-of-way will serve the community interest." *Id.* Violation of the Berkeley's ordinance could subject the applicant-carrier to civil and criminal penalties. *Id.* The court found that Berkeley's ordinance imposed an "onerous burden" on telecommunications carriers seeking to enter Berkeley's market and that, accordingly, Qwest had demonstrated a substantial likelihood of success that section 253(a) preempted the ordinance. *Id.*

In *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002), Cox Communications (dba Sprint PCS) brought a motion for a preliminary injunction, arguing that the City of San Marcos' regulations collectively created a substantial barrier to entry in violation of section 253(a). San Marcos required telecommunications providers to obtain conditional use permits in order to install facilities in public rights-of-way. *Id.* at 1262-63. To obtain a permit, providers were required to file an application, which included a complete plan, description of the property, the proposed use, satisfactory evidence that the applicant would begin construction within six months of receiving the permit, and a fee of $3,476. *Id.* at 1262. A public hearing was required. *Id.* In addition, the applicant was required to show that its proposed use of the rights-of-way w[ould] not be "materially detrimental to the public health, safety, or welfare or injurious to the property or improvement in such vicinity and zone in which the property is located" and "w[ould] not adversely affect any master or precise plan adopted pursuant to law." *Id.* San Marcos retained the discretion to grant permits "upon such conditions . . . as [the City] shall deem to be reasonable and necessary or advisable under the circumstances so that the objectives of this ordinance shall be

achieved." *Id.* at 1262-63. Violators of the ordinance could be punished by fine and/or imprisonment. *Id.* at 1263. Relying on *Auburn* and *Berkeley*, the court found that Sprint had established a substantial likelihood of success on its claim that the regulatory scheme created a substantial barrier to entry in violation of section 253(a). *Id.* at 1266.

Courts outside of the Ninth Circuit have also struck down ordinances under section 253(a) based on burdensome submission requirements and/or provisions allowing cities to grant or deny applications for permits or franchises in the exercise of their discretion. For example, in *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), the court granted summary judgment in favor of Qwest on its section 253(a) claim based on the challenged ordinance's complex informational requirements, provisions allowing the city to demand "such other information as the city may reasonably require," and provisions granting the city broad discretion in determining whether an application was "in the best interest of the public." *Id.* at 1270. The court explained that these provisions allow the city "unfettered discretion" to prohibit the provision of services. *See also TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 82 (2d Cir. 2002) ("[T]he Ordinance's provisions allowing the White Plains Common Council to consider any factor deemed to be in the public interest provide precisely the sort of discretion to prohibit telecommunications services that § 253 preempts."); *TC Systems, Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 483 (N.D.N.Y. 2003) (holding that town's franchise regulations violated section 253(a) because the regulations provided the town with "unbounded discretion to pick and choose between providers.").

Like the ordinances and regulations in the cases discussed above, the WTO includes a number of features that have the collective effect of prohibiting the provision of telecommunications service. Although the WTO establishes a four-tier application processing structure, due to the restrictive requirements of Tiers 1 and 2, all applications within the right-of-way and most outside of the right-of-way have been processed under the use permit requirements of Tiers 3 and 4. (Hamler Decl. Exh. A.)

As detailed in Section II, *supra*, the WTO and the use permit regulations impose burdensome submission requirements. Among other things, applicants must submit a list of the names of all persons having an interest in the application, complete plans, a map showing all the applicant's existing sites in the local service network, a detailed visual impact analysis, evidence that establishes that the proposed facilities have been designed to the minimum height, the anticipated maintenance and monitoring program for the equipment and landscaping, noise and acoustical information, a landscaping plan, a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities "wherever technically and economically feasible and aesthetically desirable," and any "additional information based upon specific project factors" that the Director may require. (Zon. Ord. §§ 6984(A)-(C), 7354(b)(1)-(2).) The last two requirements are the ones that trouble the Court.

The requirement that applicants state their willingness to co-locate is unreasonable because it is unclear what the terms and conditions of co-location would be (e.g., whether the applicant would receive fair compensation). The provision that applicants provide "any additional information" that may be required is overbroad.

No limit is placed on what and how much additional information the Director may require.

Similarly, the use permit requirements allow for the exercise of unfettered discretion at every level of the application process. A permit may be granted if the "location, size, design, and operating characteristics of the proposed use *will be compatible* with adjacent uses, residents, buildings, or structures, with consideration given to" specified factors, including "*any other relevant impact* of the proposed use." (Zon. Ord. § 7358(a)) (emphasis added.) Thus, the decision-maker can consider anything bearing on "compatibility," a subjective and hard-to-define standard in itself. Similarly, considerable discretion may also be exercised in determining whether the proposed facilities are "camouflaged," "consistent with community character," and have minimal "visual impact." (Zon. Ord. §§ 6985(C)(1), (3), 6987(B), (F), (O).)

Use permits may be granted or modified "subject to the performance of such conditions . . . and for such period of time as the Planning Commission, the Board of Supervisors . . . or the Director . . . *shall deem to be reasonable and necessary or advisable under the circumstances* so that the objectives of the Zoning Ordinance shall be achieved." (Zon. Ord. § 7362) (emphasis added.) In other words, the Director can impose whatever conditions the Director finds appropriate to further the stated purpose of the Zoning Ordinance, which includes the broad goals of public health, safety and welfare, preservation of community character and aesthetic quality, and minimization of intrusion into residential areas. (Zon. Ord. § 6982.)

On appeal, the appellate authority has the same unbridled discretion to grant or modify permits. Section 7336(i) provides that the authority having appellate ju-

risdiction may grant or modify the use permit subject to "specified conditions it imposes pursuant to Section 7362."[4]

All applications for a use permit and all appeals are subject to a public hearing requirement. (Zon. Ord. §§ 7356, 7366(h).) Pointing to a conference report (H.R. Conf. Rep. No. 104-458 at 208, 1996 U.S.C.C.A.N. at 223), the County argues that Congress envisioned that public hearings would be held on applications to build wireless facilities. The Court agrees that there is nothing wrong with public hearings per se. However, here, there are no provisions restricting what can be discussed at the public hearings. The lack of restrictions on what types of objections or concerns can be raised at hearings is especially problematic in light of the County's unfettered discretion to deny applications or impose conditions upon the granting of applications.

The violation of a condition imposed solely in the discretion of the appropriate authority carries adverse consequences. The permit may be revoked or modified. (Zon. Ord. § 7382(a)(2).) Furthermore, any person violating any condition of a use permit shall be deemed guilty of a misdemeanor unless, in the discretion of the prosecutor, it is charged as an infraction. (Zon. Ord. § 7703.)

Wireless providers may avoid Tier 3 or 4 review by submitting to a "master plan." However, the "master

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[4] The County argues that the use permit provisions do not give discretion to *deny* applications, but, rather, to grant or modify. However, there is no real distinction between the County's ability to impose whatever conditions it chooses upon the granting of applications and the discretion to deny applications.

plan" option presents many of the same problems as Tier 3 or 4 review. A "Wireless Community Master Plan" is defined as:

> A Master Plan of preferred sites and designs for a defined geographic area prepared in co-operation with one or more wireless service providers; formally submitted by the community planning group or sponsor group or by a homeowners association representing at least 4,000 residents and at least 5,000 acres to the Director of Planning and Land Use; *reviewed by the Director for such issues as aesthetics and community compatibility;* and following *public review,* approved by the Director.

(Zon. Ord. § 6983(W)) (emphasis added.) There are no constraints on the conditions that can be required in a Wireless Community Master Plan. (Undisputed Fact 29.)

Viewing the provisions discussed above in combination, the Court finds that the County's wireless regulations have the effect of prohibiting the provision of telecommunications services. As in *Auburn,* the County has reserved the discretion to refuse to grant applications on a "variety of methods and bases." *Auburn,* 260 F.3d at 1176 n.11.[5]

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[5] Sprint also argues that the WTO's set-back requirement has the effect of prohibiting wireless service. Based on the evidence before the Court, it is unclear whether, if applied as written, the set-back requirement would prevent the placement of wireless facilities in large areas of the County. However, the Court need not reach this issue because it finds that the WTO is preempted for the reasons discussed above. Moreover, the County claims that it has interpreted the set-back requirement as not applying to sites located along the County's road or right-of-way. (Hulse Decl., ¶ 4.)

Relying on *Portland*, 385 F.3d at 1242, the County argues that the Court should not apply section 253(a) to the use permit requirements because such requirements preexisted the WTO and apply to all applications for a conditional use permit. However, *Portland* is distinguishable. In *Portland*, Qwest challenged a number of ordinances that had been adopted over the course of many years and were applicable to utilities generally. Other than Ashland, Eugene, and Springfield, there was no indication that Portland or the other city defendants had passed ordinances that were specific to the telecommunications process. *Id.* at 1242. Although Eugene had enacted a telecommunications ordinance, Qwest did not challenge the telecommunications ordinance but, rather, separately challenged six general Eugene Code provisions that were not telecommunications-specific. *Id.* at 1242 nn.5-6. It was in this context that the Ninth Circuit noted, "We doubt whether *City of Auburn* can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process." *Id.* at 1242.

Here, Sprint challenges the entire regulatory scheme established by the WTO. Although the use permit provisions are not telecommunications specific, they are an integral part of the wireless regulatory framework governing wireless providers. Accordingly, the Court properly included the use permit provisions in its section 253(a) analysis.

C. *Section 253(c) Safe Harbor*

Regulations that violate section 253(a) are not preempted if they fall within the safe harbor of Section 253(c). Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Sprint argues that section 253(c) is an affirmative defense that the County waived by failing to plead it in its answer. The Court disagrees. Consideration of section 253(c) is a necessary part of the preemption analysis under section 253, not a defense. *See Portland*, 385 F.3d at 1242 n.7 ("If the district court finds that any of the Cities' ordinances are preempted by § 253(a), it must also consider whether the preempted ordinance provisions fall within the savings clause of § 253(c).")

The County contends that the WTO is saved by section 253(c) because it is a zoning ordinance which manages the public rights-of-way. However, the WTO is not limited to the regulation of wireless facilities in the public rights-of-way. The WTO applies to "all proposed wireless facilities in the unincorporated area of the County, including those located on private property as well as those within the County-owned rights-of-way." (County's Mem. of Points and Authorities in Support of Motion for Summary Judgment, 2:22-24.) Indeed, according to the County, most of the applications are for proposed facilities on private property. (Sprint's Request for Judicial Notice, Exh. 4, Decl. of David Hulse, ¶ 3.)

Section 253(c) clearly does not apply to the extent that the WTO goes beyond regulating the public rights-of-way and arguably does not apply to the WTO at all.

In *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 81 (2d Cir. 2002), the Second Circuit held that even though portions of a city proposal (which required prior approval of the locations of the plaintiff's network) might be permissible if *limited to public land*, the sections as written restricted the plaintiff's ability to develop a network *even on private property* and, therefore, were invalid. In cases such as *Auburn* and *Berkeley*, where the courts proceeded to a section 253(c) analysis, the challenged ordinances specifically governed the use of *public rights-of-way* by telecommunication providers.

Even if the Court were to interpret the WTO as applying to the *public rights-of-way only*, many of its requirements would not qualify as "management of the public rights-of-way." In *Auburn*, the Ninth Circuit looked to the FCC's description of management of the public rights-of-way. *Auburn*, 260 F.3d at 1177. According to the FCC:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way . . . [T]he types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping

> track of the various systems using the right-of-way to prevent interference between them.

In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21396 (F.C.C. 1997), ¶ 103.

Auburn also quoted Senator Dianne Feinstein, who, during the floor debate on section 253(c), offered examples of the types of restrictions that Congress intended to permit under section 253(c), including requirements that:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

In re Classic Telephone, Inc., 11 F.C.C.R. 13082 (F.C.C. 1996), ¶ 39 (quoting 141 Cong. Rec. S8172) (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco).

Seizing on Senator Feinstein's comment regarding enforcement of local zoning regulations, the County argues that the WTO is a zoning ordinance which falls within the definition of management of the public rights-of-way. The Court rejects the proposition that any re-

quirement that falls within the broad umbrella of "zoning" falls with section 253(c)'s safe harbor.

In *Auburn*, the Ninth Circuit refused to grant safe harbor protection to regulations that were "*more than necessary* to 'manage the rights-of-way.' " *Auburn*, 260 F.3d at 1178 (emphasis added). The court held that regulations requiring the applicant to submit proof of its financial, technical, and legal qualifications and a description of telecommunications services to be provided did not "directly relate" to management of the rights-of-way and were not saved by section 253(c). *Id.* The court also held that the provisions of the ordinances that gave the cities unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors went "far beyond the limits of § 253(c), encompassing anything a city deems to be in the public interest." *Id.* at 1179.

Here, as in *Auburn*, the regulations that permit the County to require whatever additional information it chooses and to exercise unfettered discretion in denying or imposing conditions on the granting of a use permit are more than necessary to manage the rights-of-way. These regulations do not fall within the scope of section 253(c).

The WTO does not qualify for safe harbor protection under section 253(c). Therefore, the WTO provisions that violate section 253(a), as discussed in Section III.B., *supra*, are preempted.

D. *Preservation of Zoning Authority*

Pointing to the legislative history of section 332 and cases decided under section 332, the County argues that Congress intended to preserve local zoning authority with respect to the placement, construction, and modifi-

cation of personal wireless service facilities and intended that local governments be able to deny permit applications based on aesthetics and other local zoning criteria. The Court does not dispute this proposition.

However, Congress also placed limitations on local zoning authority. Section 332(c)(7)(B)(i) provides:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

These limitations are consistent with section 253(a)'s proscription against regulations that "prohibit or have the effect of prohibiting" the provision of telecommunications service.

Thus, local governments may, in the exercise of their zoning authority, impose aesthetic requirements (*see, e.g., Ominpoint Communications Enter., L.P. v. Warrington Township*, 63 F. Supp. 2d 658 (E.D. Pa. 1999) (upholding condition of approval that provider disguise tower as a tree)) or even bar wireless facilities in certain areas (*see, e.g., APT Pittsburgh Ltd. v. Penn Township Butler County*, 196 F.3d 469 (3rd Cir. 1999) (upholding validity of zoning ordinance restricting communications towers to certain districts in Township)), *as long as they do not discriminate* against providers of functionally equivalent services *or otherwise prohibit or have the ef-*

fect of prohibiting the provision of wireless service. As already discussed, various aspects of the WTO run afoul of the latter limitation on local zoning authority.

E. *Severability*

To determine whether the invalid portions of the WTO are severable, the Court must look to state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). As discussed in *Berkeley,* under California law, an offending provision of an ordinance can be severed from the ordinance if the provision is grammatically, functionally, and volitionally separable. *Berkeley,* 146 F. Supp. 2d at 1102.

A provision is grammatically severable if it "can be removed as a whole without affecting the wording of any" of the measure's other provisions. *Id.* (quoting *Hotel Employees and Rest. Employees Int'l Union v. Davis,* 21 Cal. 4th 585, 613, 88 Cal. Rptr. 2d 56, 981 P.2d 990 (1999)). It is functionally severable if it is not necessary to the measure's operation and purpose. *Id.* Finally, it is volitionally severable if it was not of critical importance to the measure's enactment: "The final determination depends on whether the remainder .... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute." *Id.* (quoting *Calfarm Ins. Co. v. Deukmejian,* 48 Cal. 3d 805, 821, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989)).

In this case, the offending provisions are interwoven throughout the Zoning Ordinance and affect, among other things, the application procedures, approval requirements, the discretionary authority to grant or modify permits, public hearing requirements, the revocation of permits, and the imposition of penalties. As in *Auburn,* due to the number and variety of invalid provi-

sions, the Court cannot excise the objectionable portions of the Ordinance "without rendering the end product a Swiss cheese regulation that would not be capable of 'accomplishing the ordinances' legislative purposes." *Auburn*, 260 F.3d at 1181. *See also Berkeley*, 146 F. Supp. 2d at 1102 (explaining that the Court could not sever the preempted ordinance provisions because the entire application process and registration and permit requirements were "rife with invalid requirements.")

Therefore, the WTO is preempted in its entirety. Sprint is entitled to summary judgment on its first cause of action for violation of section 253(a), and the County is enjoined from enforcing the WTO.

F. *Section 1983 Claim*

In addition to seeking injunctive and declaratory relief, Sprint seeks damages under 42 U.S.C. § 1983. For the reasons discussed below, the Court finds that section 253(a) does not give rise to a private right enforceable through 42 U.S.C. § 1983.

Whether section 253(a) confers individual rights enforceable through section 1983 is a difficult question which has divided the courts. Some Courts have held that section 253(a) does not give rise to a private right of action under section 1983. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Qwest Communications Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085 (N.D. Cal. 2001). Other court decisions, including a prior decision of Judge Keep in this case, hold that section 253 confers a private right of action enforceable through section 1983. *NextG Networks of New York, Inc. v. City of New York*, 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004); *Sprint Telephony PCS v. County of San Diego*, 311 F. Supp. 2d 898 (S.D. Cal. 2004). In a two-

judge decision, the Eleventh Circuit took a unique approach, holding that section 253 supports a private cause of action under section 1983, but only when the challenged statute, ordinance, or regulation purports to address the management of the public rights-of-way, thereby potentially implicating subsection (c). *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

To determine which approach is the correct one, this Court must examine the language and structure of section 253 in addition to pertinent legislative history. A court's role in determining whether personal rights exist under section 1983 is no different than its role in discerning whether personal rights exist in the implied right of action context. *Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002). "Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.*

Once a plaintiff demonstrates that a statute creates an individually enforceable right in a class of beneficiaries to which he belongs, there is a rebuttable presumption that the right is enforceable under section 1983. *City of Rancho Palos Verdes v. Abrams*, ___ U.S. ___, 125 S. Ct. 1453, 1458 (2005). The defendant may rebut this presumption by showing that Congress did not intend a remedy under section 1983. *Id.* Such evidence of congressional intent may be found directly in the statute creating the right or inferred from the statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

The Supreme Court has set forth four factors courts should consider in determining whether a statute impliedly creates privately enforceable rights: (1) whether

the plaintiff is "one of the class for whose especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether implying a private remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is in an area of law traditionally the concern of the states. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

The second and third factors, which bear upon congressional intent, are determinative. *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004). The second factor, in particular, is "the key inquiry in this calculus." *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 835 (9th Cir. 2004).

Here, the second and third factors compel the conclusion that section 253 does not create privately enforceable rights in any context. Section 253 does not explicitly provide for or prohibit private causes of action. However, subsection (d) provides that the FCC shall preempt the enforcement of statutes, regulations, or legal requirements which violate subsection (a) or (b). Notably, subsection (d) does not mention subsection (c). The legislative history explaining the reason for this omission also establishes that Congress did not intend to create privately enforceable rights under section 253.

The legislative history of section 253(d) is set forth in *Palm Beach*, 252 F.3d at 1190-91. As initially drafted, subsection (d) provided for FCC preemption whenever any statute, regulation, or legal requirement violated or was inconsistent with "this section." S. 652, 104th Cong. (1995). Senators Feinstein and Kempthorne expressed concern that subsection (d) would impose a substantial burden on cities that would "have to send delegations of city attorneys to Washington to go before a panel of tele-

communications specialist [s] at the FCC, on what may be [a] very broad question of State or local government rights." 141 Cong. Rec. S8170 (daily ed. June 12, 1995). The Senators felt that these types of disputes should be resolved by local federal district courts and sponsored an amendment that would "strike the authority of the Federal Communications Commission to preempt state or local regulations that establish barriers to entry for interstate or intrastate telecommunications services." 141 Cong. Rec. S8305 (daily ed. June 14, 1995).

Senator Gorton responded with an amendment containing the current language of subsection (d). Senator Gorton explained:

> So my modification of the Feinstein amendment says that in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances. But if, under section (b), a city or county makes quite different rules relating to universal service or the quality of telecommunications services-the very heart of this bill—then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill.
>
> * * * * * *
>
> [The Gorton amendment] retains not only the right of local communities to deal with their rights of way, *but their right to meet any challenge on home ground in their local district courts* .... The states retain the

> right under subsection (d) to pass all kinds of legislation that deals with telecommunications providers, subject to the provision that they cannot impede competition. The determination of whether they have impeded competition, not by the way they manage trees or rights of way, but by the way they deal with substantive law dealing with telecommunications entities. That conflict should be decided in one central place, by the FCC. *The appropriate balance is to leave purely local concerns to local entities, but to make decisions on the natural concerns which are at the heart of this bill in one central place so they can be consistent across the country.*

141 Cong. Rec. S8306, S8308 (daily ed. June 14, 1995) (emphasis added). The Senate voted down the Feinstein-Kempthorne amendment and adopted the Gorton Amendment by a voice vote. *Palm Beach*, 252 F.3d at 1191.

Based on this legislative history, it is clear that when management of public rights-of-way is not at issue, the FCC, not private individuals, has enforcement authority under section 253. The trickier question is whether Congress intended to confer individually enforceable rights when subsection (c) is implicated.

The Eleventh Circuit reasoned that subsection (d) "establishes different forums based on the subject matter of the challenged statute or ordinance," and that a private cause of action exists under section 253 "to seek preemption of a state or local statute, ordinance, or other regulation only when that statute, ordinance, or other regulation purports to address the management of the public rights-of-way, thereby potentially implicating

subsection (c)." *Palm Beach*, 252 F.3d at 1191. All other section 253 challenges fall within the jurisdiction of the FCC. *Id.*

The Court disagrees with the reasoning of *Palm Beach*. The objective of the Gorton Amendment was to prevent the FCC from forcing local governments to go to Washington, D.C., to defend ordinances affecting public rights-of-way and to allow challenges to such ordinances to take place in local forums. *Berkeley*, 202 F. Supp. 2d at 1096. The focus of the amendment was on *where* preemption challenges would be decided. *Santa Fe*, 380 F.3d at 1266. The amendment was not concerned with whether individual plaintiffs could obtain damages and does not require a finding that Congress intended to create individually enforceable rights under section 253.

Palm Beach overlooks the fact that a plaintiff may bring preemption claims under the Supremacy Clause even if the federal statute at issue does not create a private right of action. *Western Air Lines, Inc. v. Port Auth. of New York and New Jersey*, 817 F.2d 222, 225-26 (1987); *Santa Fe*, 380 F.3d at 1267. "A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law." *Western Air Lines*, 817 F.2d at 225.

The Supremacy Clause is not a "source of any federal rights," but, rather, "secure[s] federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (internal quotation marks omitted) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). Interestingly, in *Auburn*, the Ninth Circuit applied principles of conflict

preemption and found that the challenged ordinances were preempted under the Supremacy Clause (as opposed to preemption through private enforcement of section 253(a)). 260 F.3d at 1180.

Under the Supremacy Clause, the remedy is preemption. In contrast, assuming the existence of a private right of action under section 253, a successful plaintiff would be entitled to damages and attorney's fees. As explained by the court in *Berkeley*, it would be contrary to congressional intent to allow private enforcement of section 253 through section 1983:

> It seems highly unlikely that Senator Gorton's amendment, intended to shield local governments from overly burdensome scrutiny or new costs in their efforts to control their public rights-of-way, would simultaneously but silently create the ability of telecommunication providers and/or individual consumers to file suit against the local governments [in] federal court under section 253(c). Under the FTA, these private plaintiffs would potentially be entitled to damages and attorney's fees whereas the FCC is only entitled to preempt the challenged ordinance under subsection (d).

202 F. Supp. 2d at 1095-96.

There is no evidence of congressional intent, in the Act itself or the legislative history, to create a private right of action under section 253. Accordingly, the Court holds that section 253(a) cannot be enforced through section 1983, regardless of whether subsection (c) is poten-

tially implicated.[6] To the extent any prior orders of Judge Keep are inconsistent with this order, they are vacated.

This Court's holding is in harmony with the Supreme Court's decision in *Abrams*. In *Abrams*, the Supreme Court held that plaintiffs cannot enforce the limitations on local zoning authority set forth in section 332(c)(7) through section 1983. To the extent that actions may be brought under both section 332(c)(7) and section 253—i.e., actions challenging regulations underlying unfavorable decisions on the ground that they prohibit or have the effect of prohibiting service—finding the existence of a section 1983 claim for violation of section 253 would totally eviscerate the Supreme Court's holding.

Finally, the Court's preemption analysis in Section III.B-D, *supra*, remains unaffected. As already discussed, Sprint has a valid preemption claim under the Supremacy Clause.

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[6] The Court disagrees with *Palm Beach* for the additional reason that its holding, while seeming reasonable in theory, is awkward to apply and would, in some instances, have nonsensical results. In this case, for example, the ordinance applies to public rights-of-way but it also applies to private property. Under the *Palm Beach* approach, it seems that Sprint would have a private right of action with respect to its section 253(a) claim because subsection (c) is potentially implicated to the extent that the ordinance applies to the public rights-of-way. However, it is not clear whether the section 1983 action would encompass the entire challenge to the ordinance, which would allow Sprint to recover damages for regulation beyond the public rights-of-way, or whether the 1983 action would be limited to the application of the ordinance to public rights-of-way, which would raise the question of how damages would be determined.

IV. Conclusion

For the reasons discussed above, Sprint's motion for partial summary judgment [46-1] is **GRANTED IN PART AND DENIED IN PART** and the County's motion for summary judgment, or, in the alternative, partial summary judgment [54-1; 54-2] is **GRANTED IN PART AND DENIED IN PART**. The Court grants summary judgment in favor of Sprint on its first cause of action for preemption by 47 U.S.C. § 253(a). The Court also grants summary judgment in favor of Sprint on its fourth cause of action for declaratory relief. The Court grants summary judgment in favor of the County on Sprint's third cause of action for violation of 42 U.S.C. § 1983.

The Court issues a declaratory judgment that Ordinance No. 9549 N.S., which amends the San Diego County Zoning Ordinance relating to wireless telecommunications facilities, is preempted 47 U.S.C. § 253(a). The Court also ORDERS that Defendants and their agents and employees, and any other persons acting on behalf of the County of San Diego, are permanently enjoined from enforcing the Ordinance.

The Clerk shall enter final judgment in favor of Sprint and against the County on Sprint's first and fourth causes of action and in favor of the County and against Sprint on Sprint's second and third causes of action.

IT IS SO ORDERED.

APPENDIX D

47 U.S.C. 253 provides:

Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)

or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply–

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

APPENDIX E

SAN DIEGO ZONING ORDINANCE

6980 WIRELESS TELECOMMUNICATIONS FACILITIES

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6981 CONFLICT RESOLUTION

Sections 6980 – 6991 are intended to be supplemental to the Zoning Ordinance. In case of conflict between the provisions represented in these sections and the provisions set forth in the Zoning Ordinance, the provisions of these sections shall apply.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6982 PURPOSE

The purpose and intent of this Section is to provide a uniform and comprehensive set of standards for the development, siting and installation of wireless telecommunications facilities. These regulations are intended to protect and promote the public health, safety and welfare of the residents of the unincorporated areas of San Diego County and to preserve community character and protect aesthetic quality in accordance with the guidelines and intent of the Telecommunications Act of 1996 and to encourage siting in preferred locations to minimize aesthetic impacts and to minimize the intrusion of these uses into residential areas.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6983 DEFINITIONS

For the purpose of the Wireless Telecommunications Facilities regulations contained in Sections 6980 through 6991, certain abbreviations, terms and words shall be

used, interpreted and defined as set forth in this Section. Unless the context clearly indicates to the contrary, words used in the present tense include the future tense and words used in the plural indicate the singular.

A. Administrative Site Plan – A Site Plan, pursuant to Sections 7150 through 7174 of this Ordinance, that does not require community review except as noted in Section 6987 A of this Ordinance.

Antenna – Any system of wires, poles, rods, reflecting discs or similar devices designed for telephonic, radio, facsimile, data or television communications through sending and/or receiving of electromagnetic waves when such system is either external to or attached to the exterior of a structure. Antennas shall include, but not be limited to, devices having active elements extending in any direction, and directional beam-type arrays having elements carried by and disposed from a generally horizontal boom that may be mounted up and rotated through a vertical mast or tower interconnecting the boom and antenna support, all of which elements are deemed to be part of the antenna.

Antenna Height – The vertical distance measured from the ground surface at grade to the tip of the highest point of the proposed structure.

Antenna Support – Any pole, telescoping mast, tower tripod or any other structure that supports a device used in the transmitting and/or receiving of electromagnetic waves.

Applicant – A person who applies for a wireless facility siting. An applicant can be the owner of the property or someone who is representing the

owner, such as a builder, developer, optional purchaser, lessor, consultant or architect.

C. Camouflaged – Any telecommunications facility that is designed to blend into the surrounding environment. Examples of camouflaged facilities may include architecturally screened roof-mounted antennas, building-mounted antennas painted to match the existing structure, antennas integrated into architectural elements, towers made to look like trees and antenna structures designed to look like light poles. Camouflaged facilities may be considered low or high visibility depending on the type of facility, degree of camouflaging and compatibility with the surrounding existing environment (see definitions of low and high visibility).

Co-location – Locating wireless telecommunications equipment from more than one provider on a single site.

Commercial Zones – are defined as consisting of the following zones: C32, C34, C35, C36, C37, C38, C40, C42, and C44, and also S88 when the proposed site is in a commercial component of a Specific Plan.

Community Character – Those unique attributes including, but not limited to, architecture, historical and cultural features, historical development patterns, landscape, hardscape and the size, scale and spacing of buildings and other structures that define a community's identity.

E. Equipment Building, Shelter or Cabinet – A cabinet or building used to house equipment used by telecommunication providers at a facility.

F. Facade Mounted Antenna – An antenna architecturally integrated into the facade of a building or structure.

Facility – See Wireless Telecommunications Facility.

Faux Trees – A term used to refer to Monopalms, Monopies and other camouflaged monopoles made to resemble different types of trees.

G. Grade – The lowest point of elevation of the finished surface of the ground, paving or sidewalk within the area between the structure and the property line or, when the property line is more than 5 feet from the structure, between the structure and a line 5 feet from the structure.

Guyed Tower – A telecommunications tower that is supported, in whole or in part, by guy wires and ground anchors.

H. High Visibility – The following shall be considered High Visibility facilities:

1) Monopoles, lattice towers and guyed towers

2) Non-camouflaged facilities

3) Faux Trees

4) Any and all wireless facilities not defined as invisible or low visibility.

High Voltage Transmission Tower – a tower carrying transmission lines of at least 132 kilovolts.

I. Industrial zones – are defined as consisting of the following zones: M50, M52, M54, M56, M58, and

also S88 when the proposed site is in an industrial component of a Specific Plan.

Invisible – Facilities, including, but not limited to towers, antennas and equipment cabinets and any other ancillary equipment, that cannot be seen from any street and from all adjacent properties and that do not result in any apparent architectural changes or additions, including Community Identification Signs when the antennas are fully integrated into the sign. The addition of landscaping, walls, fences or grading as screening techniques does not meet the definition of invisible.

L. Lattice Tower – A guyed or self-supporting three or four sided, open, steel frame support structure used to support telecommunications equipment.

Low Visibility – the following shall be considered Low Visibility facilities if they do not exceed the height schedule pursuant to Sections 4610 – 4620 of this Ordinance:

1) Whip antennas not exceeding six feet in length or height, including mounting, and measuring no more than 3 inches in diameter, located on existing structures including, but not limited to, water storage tanks, high-voltage transmission towers, utility towers and poles, sign standards, and roadway overpasses, if the addition, including any vertical mounting, does not result in an increase in height of the structure of more than 5 feet, and with equipment cabinets that are screened from view by means other than new walls or fences and have total dimensions no greater than 50 cubic feet and no dimension

greater than 6 feet. Cabinets in underground vaults are not included in the size calculation.

2) Panel-shaped antennas that are flush-mounted to an existing building facade or other existing structure on at least one edge, extend a maximum of 24 inches from the building facade or other structure at any edge, do not exceed the height of the building or other structure by more than five (5) feet and are designed to blend with the color and texture of the existing building or structure, with no equipment cabinet visible.

3) Facilities, including equipment cabinets, that are camouflaged from public view through the use of architectural treatments, such as cupolas, faux water towers, windmills or other structures and which are consistent with existing development and community character.

4) Additions to existing permitted low-visibility facilities if the additions themselves meet the definition of low visibility and are designed to minimize visibility of both the facility and equipment cabinets that have total dimensions no greater than 50 cubic feet and no dimension greater than 6 feet and are screened from view by means other than new walls and fences. The equipment cabinet may be larger if contained inside a structure consistent with the architecture and character of the site.

5) Changes to an existing building that are consistent with the building's architectural style and the equipment cabinet is not visible.

M. Monopalm – a monopole camouflaged to resemble a palm tree.

Monopine – a monopole camouflaged to resemble a pine tree.

Monopole – A wireless communication facility consisting of a single pole constructed without guy wires and ground anchors.

P. Panel Antenna – An antenna or array of antennas designed to concentrate a radio signal in a particular area. Also called directional antennas.

R. Residential Zones – for purposes of this section, are defined as consisting of the following zones: RS, RD, RR, RM, RV, RU, RMH, RRO, RC, S80, S87, S90, C30, C31, C46 and also S88 when the proposed site is in a residential component of a Specific Plan.

Roof Mounted Antenna – Any antenna with its support structure placed directly on the roof of any building or structure.

Rural Zones – are defined as consisting of the following zones; A70, A72 and S92.

S. Service Area – The area served by a single telecommunications facility.

Service Network – The telecommunications transmission system operated by a service provider in a community or jurisdiction.

Special Purpose Zones – are defined as consisting of the following zones: S82, S86 and S94.

T. Telecommunications – The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Tower – Any mast, pole, monopole, guyed tower, lattice tower, free standing tower or other structure designed and primarily used to support antennas.

Tower – See Telecommunications Tower.

W. Whip Antenna – An antenna that transmits signals in 360 degrees. Whip antennas are typically cylindrical in shape and are less than 3 inches in diameter and measure up to 6 feet in length, including the mounting. Also called omni-directional, stick or pipe antennas.

Wireless Community Master Plan – a Master Plan of preferred sites and designs for wireless facilities for a defined geographic area prepared in cooperation with one or more wireless service providers; formally submitted by the community planning group or sponsor group or by a homeowners association representing at least 4,000 residents and at least 5,000 acres to the Director of Planning and Land Use; reviewed by the Director for such issues as aesthetics and community compatibility; and following public review, approved by the Director. A Community Master Plan can be applicable to allproviders or to selected providers as defined in the Plan.

Wireless Telecommunications Facility - Any facility that transmits and/or receives electromagnetic waves, including, but not limited to, antennas, dish antennas and other types of equipment for the transmission or receipt of such signals, telecommunications towers or similar structures supporting said equipment, equipment buildings, parking area and other accessory development. Also known as a

wireless communications facility. This definition does not apply to Amateur Radio Stations as defined by the Federal Communications Commission, Part 97 of the Commission's Rules nor to N and radio transmission facilities.

(Added by Ord. 9549 (N.S.) adopted 4-30-03)

6984 APPLICATION REQUIREMENTS

In addition to meeting standard application submittal requirements for discretionary permits, all applicants for wireless telecommunications facilities shall provide 3 copies of the information listed below. One copy shall be distributed by the Department to the appropriate Planning or Sponsor Group. When a facility meets all requirements for processing under Tier 1, the requirements of Sections B and C 1 shall not be required. The Director of the Department of Planning and Land Use may waive any of the submittal requirements listed below or require additional information based upon specific project factors:

A. Geographic Service Area. Identify the geographic service area for the subject installation, including a map showing all the applicant's existing sites in the local service network associated with the gap the facility is meant to close. Describe how this service area fits into and is necessary for the company's service network.

B. Visual Impact Analysis. A visual impact analysis shall be provided showing the maximum silhouette, viewshed analysis, color and finish palette and proposed screening. The analysis shall include photo simulations and other information as necessary to determine visual impact of the facility. A map depicting

where the photos were taken shall be included.

C. Narrative.

1. Height. Show the height of the facility. Carriers must provide evidence that establishes that the proposed facilities have been designed to the minimum height required from a technological standpoint for the proposed site. If the tower will exceed the maximum permitted height limit, as measured from grade, a discussion of the physical constraints (topographical features, etc.) making the additional height necessary shall be required.

2. Maintenance. Describe the anticipated maintenance and monitoring program for the antennas, back-up equipment and landscaping.

3. Noise/Acoustical Information. As part of the Application for Environment Initial Study, provide manufacturer's specifications for all equipment such as air conditioning units and back-up generators, and a depiction of the equipment location in relation to adjoining properties.

4. If the site is not a preferred site as described in Section 6986, provide the information required in Section 6986 B.

5. Concept Landscape Plan. Provide a plan showing all proposed landscaping, screening and proposed irrigation with a discussion of how the chosen material at maturity will screen the site.

6. Fire Service. Provide evidence of compliance with Fire Policy FP-2 or a service letter from the applicable fire district.

7. Hazardous Materials. Listing of all hazardous materials to be used onsite.

8. For all applications for facilities located in the public right of way, include on the plot plan the location of parking for maintenance personnel.

9. A letter stating the applicant's willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable.

10. The lease area of the proposed facility on the plot plan.

11. For all applications for wireless facilities operating below 1200 megahertz, submit a copy of the Federal Communications Commission Licensing Application Form 601, Main Form, Pages 1 through 4, Schedule A, Page 1, Schedule D, Page 1 and Schedule H, Pages 1 through 3. The application shall be reviewed by the Sheriff's Wireless Services Unit to determine potential interference with the Regional Communication System. Interference with that system may be grounds for denial.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6985 APPLICATION PROCESSING

Although a tier may be assigned at project intake, a re-evaluation of the project tier may occur at any point in the process, including, but not limited to, review by the Planner, Environmental Analyst or Hearing Officer.

A. Applications will be processed based upon the following 4-tier permitting system, subject to the exceptions and general regulations found in Sections 6985 B

and C:

TIER 1 – ADMINISTRATIVE SITE PLAN

Facilities meeting any of the following criteria shall be processed as an ADMINISTRATIVE SITE PLAN:

Industrial and Commercial Zones

- Invisible facilities
- Facilities on:

  - CALTRANS structures, "cobra-style" streetlights and poles in the public right of way, or an existing park and ride light standard, when they meet all the following:

  - The antennas do not project more than 24 inches above the structure,

  - No more than a total of two antennas are located on a site

  - The equipment cabinet is no larger than 6 cubic feet.

  - The equipment cabinet is concealed from public view through the use of undergrounding or screening by means other than walls or fences.

- Façade mounted antennas integrated into the architecture in such a manner that no change to the architecture is apparent and no part of the facility can be seen from public view.

- Facilities not subject to the "B", "D", "H" or "J" Designators and are:

  - Hidden from public view through the use of architectural treatments (cupolas, etc.); and

- Consistent with the existing building and community character.

Any Zone

• Antennas located on high voltage transmission towers if they increase the bulk and scale of the structure by less than 5 percent.

TIER 2 – SITE PLAN WITH COMMUNITY REVIEW

Facilities meeting any of the following criteria shall be processed as a SITE PLAN WITH COMMUNITY REVIEW:

Commercial, Industrial and Special Purpose Zones

• Low visibility facilities.

All Zones

• Facilities covered by a Wireless Community Master Plan when the design and siting are consistent with the plan.

TIER 3 – MINOR USE PERMIT

Facilities meeting any of the following criteria shall be processed as a MINOR USE PERMIT:

• All facilities other than those meeting the criteria of Tiers 1, 2, or 4.

TIER 4 – MAJOR USE PERMIT

Facilities meeting the following criteria shall be processed as a MAJOR USE PERMIT:

- Non-camouflaged towers greater than 60 feet, or 15 feet above the maximum allowed height limit in the zone, whichever is lower, shall require a Major Use Permit in all zones (except where they are prohibited).
- All facilities in Residential and Rural zones except as specified in Tiers 1 and 2.

B. Exceptions

1. In addition to all other requirements in Sections 6980 through 6991, any proposed facility on a structure currently subject to a Major or Minor Use Permit shall obtain approval of the facility through the modification of the permit in accordance with Section 7378 of this Ordinance for a Use Permit or by Minor Deviation in accordance with Section 7609 of this Ordinance when the facility is invisible.

2. Major Use Permits for Wireless Telecommunications Facilities shall be under the original jurisdiction of the Planning Commission.

C. General Regulations

1. Non-camouflaged monopoles, lattice towers and guyed towers are prohibited in Residential and Rural zones.

2. All buildings and structures built to contain equipment accessory to a facility may not exceed 10 feet in height measured from the base of the foundation unless a greater height is necessary to maximize archi-

tectural integration and shall be screened by landscaping.

3. No more than three facilities are allowed on any site or parcel in commercial, industrial, rural or special purpose zones. No more than one facility is allowed on any parcel or site in a Residential zone. This requirement may be waived by the Director if a finding is made that co-location of more facilities is consistent with community character.

4. Telecommunications towers located adjacent to a residential use shall be set back from the nearest residential lot line by a distance at least equal to its total height or 50 feet, whichever is greater. The setback shall be measured from that part of the tower that is closest to the neighboring property (i.e., the setback for a faux tree would be measured from the end of the branch closest to the neighboring property).

5. No tower or equipment shall be located in a front, rear or side yard setback in any zone and no portion of any antenna array shall extend beyond the property lines.

6. Noise from any equipment supporting the facility shall meet the requirements of the County's Noise Ordinance on an average hourly basis.

7. The Director of Planning and Land Use may waive the requirements for a Site Plan pursuant to Section 7156 of this Ordinance if he finds that all of the purposes and requirements of the Site Plan have been or will be fulfilled by another discretionary permit, or where the Director finds the proposed development or improvement is minor in nature and the public purpose for which the Site Plan would normally be required will not be harmed by waiver of said requirement. Director's

decisions may be appealed pursuant to Section 7200 of the Zoning Ordinance.

8. All facilities located on a utility pole shall be promptly removed at the operator's expense at the time a utility is scheduled to be undergrounded.

9. Maintenance vehicles servicing facilities located in the public or private right of way shall not park on the traveled way or in a manner that would obstruct traffic.

10. Equipment cabinets and antenna structures shall be secured to disallow unauthorized access.

11. Use Permits for high visibility facilities shall have a maximum term of 6 years for facilities valued at less than $10,000; 10 years for facilities valued from over $10,000 to $500,000; and 15 years for facilities valued at $500,000 or more. This may be extended for an additional period of time by modifying the permit if it is found that no smaller or less visible technology is available or feasible to replace the facility.

12. As a condition of approval, prior to use of the facility, submit evidence, such as photos, to the satisfaction of the Director of Planning and Land Use to show proof that the facility is in conformance with photo simulations provided pursuit to Section 6984 (B) of this Ordinance.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6986 PREFERRED SITES

A. The County has determined that certain zones and locations are preferable to others for siting wireless facilities due to aesthetics and land use compatibility.

1. The preferred zones are as follows:

PREFERRED ZONES	NON-PREFERRED ZONES
(a.) C32, C34, C35, C36, C37, C38, C40, C42, C44, M50, M52, M54, M56, M58, S82, S86, S94, and S88 when the facility would be located in a commercial or industrial component of the Specific Plan. (b.) Upon approval by the Director of Planning and Land Use of a Wireless Community Master Plan, the Preferred Zones for that defined geographic area shall be replaced by the locations shown in that Plan for the provider or providers covered by the plan.	All other zones.

2. The preferred locations are as follows:

PREFERRED LOCATIONS	NON-PREFERRED LOCATIONS
(a.) (1) Existing structures, including, but not limited to, water tanks, utility towers and poles, traffic lights, "cobra-style" street lights, and roadway overpasses in non-residential zones when the size and scale are compatible. (2) Commercial and industrial buildings.	All other locations.

(3) County or other government facilities (e.g., fire district buildings, road stations, freeway park and ride lots), excluding Elementary and Middle schools and County parks. (4) Co-location in zones other than residential to a total of three (3) towers each. (b.) Upon approval by the Director of Planning and Land Use of a Wireless Community Master Plan, the Preferred Locations for that defined geographic area shall be replaced by the locations shown in that plan for the provider or providers covered by the plan.	

B. Each application shall identify the zone and location preference that the proposed facility is meeting. If the proposed facility is not in a preferred zone identified in 6986 A (1) or if it is not in a preferred location identified in 6986 A (2), the applicant shall provide a map of the geographical area and a discussion of preferred sites that could potentially serve the same area as the proposed site and describe why each preferred site was not technologically or legally feasible. Facilities proposed to be located in County parks are excluded from this requirement when the Director of the Department of Parks and Recreation has issued a letter of concurrence.

C. Projects in a non-preferred zone or non-preferred location shall not be approved when siting in a preferred zone or preferred location is feasible unless a finding is

made that the proposed site is preferable due to aesthetic and community character compatibility.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6987 DESIGN REGULATIONS

A. All applications at sites subject to a "H", "J", "B" or "D" design review designator shall also meet all requirements pursuant to Zoning Ordinance Sections 5700 – 5747 for "H" designators, 5749 for "J" designators, 5750 – 5799 for "B" designators or 5900 – 5910 for "D" designators.

B. All camouflaged facilities shall be designed to visually and operationally blend into the surrounding area in a manner consistent with community character and existing development. The facility shall also be appropriate for the specific site (i.e., it should not "stand out" from its surrounding environment, such as a faux tree standing alone in a field or standing at a greater height (five feet or more) than other trees on the site).

C. No facility shall be allowed on any building or structure, or in any district, that is listed or eligible for listing on any Federal, State or local historical register unless it is determined by the Historic Site Board that the facility will have no adverse effect on the appearance of the building or structure or its eligibility for historic designation. No change in architecture nor High Visibility facility is permitted on any such building, any such site or in any such district.

D. In cases where the facility site is visible from "Official", "First", "Second" or "Third" Priority Scenic Highways, as identified in the General Plan, the facility shall be designed and located in such a manner as to avoid adverse visual impacts. Such locations shall use

design methods such as, but not limited to, type of facility, camouflaging, screening and landscaping. No monopoles, lattice towers or guyed towers are permitted

E. Façade-mounted antennas shall be architecturally integrated into the building design and otherwise made as unobtrusive as possible. If possible, antennas should be located entirely within an existing or newly created architectural feature so as to be completely screened from view. Façade-mounted antennas shall not extend more than 24 inches out from the building face.

F. All facilities shall be designed to minimize the visual impact to the greatest extent feasible by means of placement, screening, landscaping with native species, whenever feasible, and camouflage, and to be compatible with existing architectural elements, building materials and other site characteristics. The applicant shall use the least visible antennas possible to accomplish the coverage objectives.

G. Colors and materials for facilities shall be nonreflective and chosen to minimize visibility. Facilities, including support equipment and buildings, shall be painted or textured using colors to match or blend with the primary background. All cabinets visible to the public shall be treated with a graffiti-resistant coating.

H. Beacon lights shall not be included in the design of facilities unless required by the Federal Aviation Administration and shall be included when calculating the height of the facility.

I. No High Visibility facility, including ancillary support equipment, may be located between the face of a building and a public street, bikeway, trail or park.

J. No signs, striping, graphics or other attention getting devices are permitted on the transmission tower or ancillary facilities except for warning and safety signage with a surface area of no more than three square feet. Such signage shall be affixed to a fence or ancillary facility and the number of signs is limited to no more than two unless a greater number is required by law.

K. All high visibility facilities shall be sited in such a manner as to cause the least detriment to the viewshed of adjoining properties.

L. Roof mounted antennas shall be constructed at the minimum height possible to serve the operator's service area and shall be set back as far from the edge of the building as possible or otherwise screened to minimize their visibility.

M. No net loss in required parking spaces shall occur as a result of the installation of any wireless telecommunications facility.

N. Cabinets and other equipment shall not impair pedestrian use of sidewalks or other pedestrian pathways, nor inhibit equestrian activities on designated public or private trail systems and shall be screened from the sidewalk by landscaping, undergrounding or other means, excluding new wails and fences.

O. In cases where the facility site is visible from a County park or is proposed to be located in a County Park, the facility shall be designed and located in such a manner as to avoid adverse visual impacts. Such locations shall use design methods such as, but not limited to, type of facility, camouflaging, screening and landscaping. No monopoles, lattice towers or guyed towers are permitted.

P. The use of chain link fences for security of equipment is permitted if the fence is fully screened by landscaping. No razor wire or barbed wire is permitted. Slats do not satisfy the requirement for screening.

Q. Site lighting shall be kept to a minimum in every instance, shall be shielded to direct the light downward, shall be controlled by a manual switch or timed switch of no greater than one hour's duration and shall not be used except when nighttime maintenance is necessary.

R. No facility sited on a ridgeline or hilltop shall be approved unless the facility blends with the surrounding existing and man-made environment to the maximum extent possible and a finding is made that no other location is feasible.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6988 MAINTENANCE

A. All graffiti on any components of the facility shall be removed promptly in accordance with County regulations. Graffiti on any facility in the public right-of-way must be removed within 48 hours of notification.

B. All landscaping shall be maintained at all times and shall be promptly replaced if not successful.

C. If a flagpole is used for camouflaging a facility, flags must be flown and must be properly maintained at all times.

D. All wireless telecommunications sites shall be kept clean and free of litter.

E. All equipment cabinets shall display a legible operator's contact number for reporting maintenance problems.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6989 ABANDONMENT OR DISCONTINUATION OF USE

A. All operators who intend to abandon or discontinue the use of any wireless telecommunications facility shall notify the County of such intentions no less than 60 days prior to the final day of use.

B. Wireless telecommunications facilities with use discontinued shall be considered abandoned 90 days following the final day of use.

C. All abandoned facilities shall be physically removed by the facility owner no more than 90 days following the final day of use or of determination that the facility has been abandoned, whichever occurs first.

D. The County reserves the right to remove any facilities that are abandoned for more than 90 days at the expense of the facility owner.

E. Any abandoned site shall be restored to its natural or former condition. Grading and landscaping in good condition may remain.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6990 REVOCATION

Failure to comply with any condition of approval or standard in this ordinance shall constitute grounds for possible revocation of use pursuant to Sections 7174, 7380 and 7382 of the Zoning Ordinance.

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)

6991 AMORTIZATION OF HIGH VISIBILITY FACILITIES IN RESIDENTIAL AND RURAL ZONES

Notwithstanding any other sections regulating wireless facilities, all facilities defined as "high visibility" by this ordinance, and located in a Residential or Rural Zone shall be brought into conformance with this ordinance under the following amortization schedule. The time allowed shall be measured from the effective date of this ordinance. The Director may extend the amortization period upon a showing of economic hardship to the owner.

Fair Market Value on Effective Date	Minimum Years Allowed
Under $10,000	6
$10,000 - $500,000	10
Over $500,000	15

(Added by Ord. No. 9549 (N.S.) adopted 4-30-03)